SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-846

JOHN W. WINGO

Petitioner,

—v.—

CARL JAMES WEDDING

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Date 1971	Proceedings
8-25	Petition for Writ of Habeas Corpus tendered Motion for Leave to Proceed Forma Pauperis Affidavit Forma Pauperis Motion for Personal Appearance Webster Circuit Court Memorandum attached Court of Appeals — Opinion of the Court by Judge Steinfeld Court of Appeals — Rebuttal for Appellant Appeal from Webster Circuit Court Ct. of Appeals of Ky. Brief of Appellee
9-13	Order by Magistrate Booth 9-9-71, petitioner granted permission to proceed in forma pauperis in this action and petition for writ filed without prepayment of fees and costs; further that respondent show cause, if it exists, why writ should not be granted by the filing of a return within three (3) days, unless for good cause additional time required, in which return shall be filed not more than 20 days from the date of this order. Copies to Judge Gordon,

Carl James Wedding, John B. Breckinridge, and John W. Wingo.

9-13 Petition for Writ filed by order of Court.

9-30 Response to Petition for Habeas Corpus and Motion to Dismiss w/Memorandum in Support of Motion to Dismiss.

10-18 Rebuttal Writ of Habeas Corpus

10-29 ORDER: petition dismissed. Cys to petitioner, Breckinridge and Wingo.

11-9 Certificate of Probable Cause
Notice of Appeal tendered
Motion to Proceed in Forma Pauperis w/ Affidavit.

11-22 ORDER granting Petitioner's request for certificate for probable cause and motion to proceed in forma pauperis. Cys to Carl James Wedding, Breckinridge and Wingo.

1972

12-27 Mailed record and clerk's certificate to USCA, cy of letter to Wedding and Breckinridge.

4-26 Rec. filed from USCA, Adjudged, "that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded. No costs awarded inasmuch as this appeal is in Forma Pauperis." Cys. to Carl James Wedding and the Attorney General.

5-8 ORDER entered by Dale R. Booth, US Magistrate, setting evidentiary hearing before U. S. Magistrate in Room 413, U.S. Courthouse, Louisville, Ky., commencing 9:30 a.m. on June 7, 1972, on issues raised in petition. Hon. Joseph G. Glass appointed counsel for petitioner. Cys. to Carl James Wedding, Petitioner; Ed W. Hancock, Atty. General; Warden, Ky. State Penitentiary; Hon. Joseph G. Glass & U. S. Marshal.

5-17 Motion to disqualify Magistrate from Holding Habeas Corpus Evidentiary Hearing filed by Petitioner.

5-17 Memorandum filed in support of Motion.

5-30 Order entered 5-31-72; petitioner having filed motion asking Ct. to disqualify U. S. Magistrate from conducting evidentiary hearing on issues raised by petitioner, & to assign said hearing to a Judge of District Ct., ORDERED, that said Motion be overruled. Cys. to Carl James Wedding, Ed W. Hancock, Joseph G. Glass & John W. Wingo. MNL:dh

5-30 Order entered, evidentiary hearing set before U.S. Magistrate commencing at 9:30 A.M. June 7, 1972, is hereby rescheduled for 1:30 p.m., June 26, 1972. Cys. to Wedding, Hancock, Glass, Wingo & U. S. Marshall.
MNL:dh

6-13 USM-285 & Civil Subpoena: Faust Y. Simpson on 6-9-72 to appear on 6-26-72; W. Fred Hume, endvr. to serve on 6-9-72; Mr. Hume in poor health & unable to go to L'ville so did not accept advance check for $51.60 which was ret. to atty.

6-19 Entered Order signed by Dale Booth, U.S. Magistrate on 6-15-72 that Marshal is directed to Lodge petitioner in Daviess County Jail not earlier than June 23, 1972 & bring him to the hearing herein. Cys. to Carl James Wedding, Ed W. Hancock, Joseph G. Glass, John W. Wingo & U.S. Marshal.

6-28 Order that evidentiary hearing be conducted at Courthouse at 4:30 p.m. June 26, 1972, & U.S. Marshal directed to convey petitioner to hearing above scheduled & return him to Daviess County Jail at conclusion. (Dixon, Ky.)

6-30 Order, case came on for evidentiary hearing on 6-26-72, Magistrate would make findings of fact, etc. & transmit same to District Judge. Cys. to Judge Gordon, Wedding, Hancock, Glass & Wingo

7-14 USM-285 & Order returned

8-30 Entered Order signed by Magistrate Booth on 8-21-72 that respondent within 10 days from entry of this order, file authenticated

copies of all state court proceedings conducted in petitioner's case. Cys. to Joseph G. Glass & Ed W. Hancock.

9-8 Letter from Attorney General enclosing copies of State Court proceedings w/exhibit A-J.

9-14 Report & Recommendations filed by Magistrate

9-14 Findings of Fact & Conclusions of Law filed by Magistrate.

9-14 Tendered Order.

9-22 Request by Mr. Glass for Ct. to hear testimony;

9-27 Memorandum filed by Mr. Glass.

10-11 Order signed by Judge Gordon on 10-10-72, Ct. Having considered all pleadings & having read and considered Magistrate's Findings of Fact & Conclusions of Law filed on 9-14-72 & his report & recommendation & upon motion of petitioner having heard recorded testimony of the evidentiary hearing accorded the petitioner; ORDERED that said Findings of Fact & Conclusions of Law filed by the Magistrate be, & they are, adopted & restated by the undersigned as his own Findings of Fact & Conclusions of Law & Petition for Writ of Habeas Corpus is hereby ORDER-

ED DISMISSED. Cys. to Carl James Wedding, Ed W. Hancock, John W. Wingo, Joseph G. Glass & U.S. Magistrate Dale Booth.

10-19 MOTION for certificate of probable cause and leave to proceed in forma pauperis filed by petitioner. Order tendered. Notice of appeal tendered.

10-24 ORDER signed by Judge Gordon 10-20-72 that Petitioner's Motion issued certificate of probable cause is hereby sustained and that petitioner's motion for leave to proceed in forma pauperis is hereby sustained. Cys. Ed Hancock, Curran Clem, Joe Glass & Judge Booth.

10-20 NOTICE OF APPEAL filed by petitioner. Cys. of Notice mailed to: Hancock, Clem, Glass & Booth along with copies of the docket entries.

10-25 NOTICE OF APPEAL from Order entered Oct. 11, 1972, filed by Carl Wedding, Cys. of same to Joseph G. Glass, Ed W. Hancock, Curran Clem & Judge Booth; filed with attachments of motion to proceed in forma pauperis on appeal, motion of probable cause & certified records for Appeal.

11-21 Mailed record to USCA; cy. of clerk's certificate, letter to USCA, & cy. of docket

entries sent to Carl James Wedding, Joseph G. Glass, Ed Hancock, Curran Clem & John W. Wingo.

* * * * * * *

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 72-2160 Prior Appeal No. 71-2090

DATE	FILINGS—PROCEEDINGS	Filed
1972		
Nov. 30	Certified record (1 vol. of pleadings), filed; and cause docketed	
Dec. 5	Motion of Appellant for appointment of counsel (Granted — JWP)	
Dec. 5	Motion of Appellant for leave to hear case on original record without appendix (Granted)	
1973		
Feb. 2	Order appointing counsel for Appellant	W-114
Mar. 14	Four copies of Brief for Appellant	
Mar. 14	Proof of service of brief for Appellant	
Apr. 13	Twenty-five copies of Brief for Appellee	
Apr. 13	Proof of service of brief for Appellee	
Apr. 13	Appearance of counsel for Appellee	
May 11	Motion of Appellee to file supplemental citation (Granted — Phillips, J.)	
May 29	Motion of Appellee to file supplemental citation (Copies distributed to the court)	

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DATE	FILINGS—PROCEEDINGS	Filed
June 11	Cause argued and submitted (Before: Phillips, Weick and Cecil, JJ.)	Y-5
Aug. 31	Judgment of the District Court vacated and the case is remanded with instructions that the Court hold an evidentiary hearing on Petitioner's constitutional claims	Z-5
Aug. 31	Opinion by Weick, J.	
Sep. 17	Motion for stay of mandate	
Sep. 17	Letter from counsel for Appellee requesting preparation of record for Supreme Court	
Sep. 18	Certified record for certiorari, including original record, mailed to Supreme Court	
Sep. 26	Order staying mandate thirty days (Weick, J.)	Z-7
Oct. 26	Motion for extension of time for stay of mandate (Motion granted — Weick, J.)	
Dec. 3	Notice of filing petition for certiorari on 11/30/73 (Sup. Ct. 73-846)	

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DATE	FILINGS—PROCEEDINGS	Filed
1974		
Jan. 29	Certified copy of order of Supreme Court granting certiorari on 1/21/74	

* * * * * * *

No. 71-2090

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING,

Petitioner,

v.

JOHN W. WINGO, WARDEN KENTUCKY STATE PENITENTIARY,

Respondent.

Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed March 16, 1972.

Before PHILLIPS, Chief Judge, and WEICK and MILLER, Circuit Judges.

PER CURIAM. Wedding appeals from the dismissal of his petition for writ of habeas corpus without an evidentiary hearing.

He is serving a life sentence imposed in 1949 by the Webster Circuit Court in Kentucky after a plea of guilty to murder. He asserts among other things that his counsel was not appointed until the day of the trial; that he was not advised of his right of trial

by jury; and that his guilty plea was coerced by threat of a possible death sentence.

The record disclosed that Wedding filed a post conviction proceeding under R.Cr. 11.42 in the State courts of Kentucky, which was dismissed without an evidentiary hearing. The Kentucky Court of Appeals affirmed in an opinion rendered June 11, 1971, *Wedding* v. *Commonwealth*, 468 S.W.2d 273.

We conclude that the petition for habeas corpus presents issues of fact requiring an evidentiary hearing. *Townsend* v. *Sain*, 372 U.S. 293, *Yates* v. *Wingo*, 425 F.2d 1167 (6th Cir. 1970).

Reversed and remanded.

* * * * * * *

Entered May 8, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Commonwealth of Kentucky, et al, Respondents

CIVIL ACTION NO. 2591-G

ORDER

By order entered October 27, 1971, the petitioner's petition for writ of habeas corpus was dismissed. By its opinion filed March 16, 1972, and issued as mandate April 24, 1972, the United States Court of Appeals for the Sixth Circuit (#71-2090) reversed and remanded the case for an evidentiary hearing on the basis that "The petition for habeas corpus presents issues of fact requiring an evidentiary hearing."

Accordingly an evidentiary hearing is hereby ordered to be conducted before the United States Magistrate in Room 413, United States Courthouse, Louisville, Kentucky, commencing at 9:30 a.m. on June 7, 1972, on the issues raised in the petition.

The United States Marshal is directed to cause the petitioner to be brought from his present place of incarceration in the custody of Warden of the Kentucky State Penitentiary, Eddyville, Kentucky, and

to be lodged in the Louisville City Jail on a date not later than May 31, 1972, in order that he may have opportunity to consult with his counsel and to be brought to the hearing herein ordered.

The Honorable Joseph G. Glass is appointed as counsel for the petitioner.

May 4, 1972

/s/ Dales R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
Carl James Wedding, Petitioner
Ed W. Hancock, Attorney General,
Commonwealth of Kentucky
Warden, Kentucky State Penitentiary
Honorable Joseph G. Glass
United States Marshal

A Copy: Attest
August Winkenhofer, Jr., Clerk
By /s/ W. Hatcher
Deputy Clerk

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden
Commonwealth of Kentucky, et al, Respondents

CIVIL ACTION NO. 2591-G

MOTION TO DISQUALIFY MAGISTRATE FROM HOLDING HABEAS CORPUS EVIDENTIARY HEARING

Comes the Petitioner, Carl James Wedding, by counsel, and respectfully moves this Court to enter an Order disqualifying the Hon. Dale R. Booth, United States Magistrate, from holding the evidentiary hearing in the matter herein, and assigning the hearing before a district judge of the United States District Court for the Western District of Kentucky.

By Order, entered May 4, 1972, an evidentiary hearing is scheduled for June 7, 1972, at 9:30 a.m. before the United States Magistrate.

It is the Petitioner's contention and belief that the Federal Magistrate's Act, 28 U.S.C. §631, et seq, does not empower a United States Magistrate to hold such evidentiary hearings.

In support of petitioner's Motion, he attaches

herewith his Memorandum of Law concerning the issue.

Respectfully submitted,

/s/ Joseph G. Glass
JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-7288

I hereby certify that a copy of the foregoing Motion was mailed, postage prepaid, to the Hon. Dale R. Booth, United States Magistrate, Federal Building, Louisville, Kentucky; the Hon. Ed W. Hancock, Attorney General, State Capitol Building, Frankfort, Kentucky, on this 16th day of May, 1972.

/s/ Joseph G. Glass
JOSEPH G. GLASS

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, **Petitioner**

v.

JOHN W. WINGO, Warden
Commonwealth of Kentucky, et al, **Respondents**

CIVIL ACTION NO. 2591-G

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION TO DISQUALIFY UNITED STATES MAGISTRATE FROM HOLDING HABEAS CORPUS EVIDENTIARY HEARING

The *Federal Magistrate's Act,* (hereinafter referred to as The Act) 28 U.S.C. §631, et seq, created the position of United States Magistrate (hereinafter referred to as Magistrate) by appointment of the Court, in the various judicial districts. The jurisdiction and powers of the Magistrate are set forth in 28 U.S.C. §636, and are set forth as follows:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment —
>
> > (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to —

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affimation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court, would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed be-

fore a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

With regard to the Act itself, the petitioner calls the Court's attention to three (3) particular subsections of 28 U.S.C. §636. Those being:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment —
>
> > (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; . . .
> >
> > (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of this section.
>
> (b) . . . The additional duties authorized by rule may include, but are not restricted to —
>
> > (3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, ***and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.*** (Emphasis added).

In *Holiday* v. *Johnston,* 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), the Supreme Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions. In its opinion the Court reasoned, at page 352. that:

> One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

The court then went on to hold, at pages 353-354, that:

> The District Judge should *himself* have heard the prisoner's testimony and, in light of it and other testimony, *himself* have found the facts and based *his* disposition of the cause upon *his* findings (Emphasis added).

Last year, the United States Court of Appeals for the Sixth Circuit, utilizing the above language from *Holiday,* supra reversed a decision of this Court where a Special Master (actually the duly appointed United States Commissioner) had been appointed to hold an evidentiary hearing on a federal habeas corpus petition. *Payne* v. *Wingo,* 422 F.2d 1192 (1971). This case was later followed by *Green* v. *United States,* 445 F.2d 847 (6th Cir., 1971).

In *Payne,* supra, the Court went on to discuss that the Federal Rules of Civil Procedure "provide no authority for the delegation of the conduct of a habeas corpus evidentiary hearing to a Special Master." (p. 1194). Moreover, the Court considered the tremendous

case load of the district courts, and on that point stated, at page 1194.

> . . . Nevertheless we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a clear mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary.

It is noteworthy to observe that *Holiday*, supra, was decided on the basis of 28 U.S.C. §457, 458 and 461, and principally upon §461. Those sections were incorporated within 28 U.S.C. §2243 enacted June 25, 1948. (*Holiday*, supra, and Reviser's note: 28 U.S.C.A. §2243).

Further, in *Payne*, supra, at page 1194, the Court discussed 28 U.S.C. §461 and its successor 28 U.S.C. §2243 with regard to the terms *the court, or justice, or judge*. Again, at page 1194, the Court stated:

> . . . Although the statute interpreted in Holiday authorized 'the court, or justice or judge' to determine the facts, and the current provision merely refers to 'the court,' we do not find the difference significant. The Supreme Court in Holiday essentially held that the phrase 'court, or justice, or judge' in 28 U.S.C. § 461 referred to a federal judge rather than a commissioner. Since these words were phrased in the alternative in that statute, the Supreme Court in Holiday found that the 'court' was the equivalent of the word 'judge' for purposes of 28 U.S.C. § 461. When Congress retained the reference to the 'court' in

> the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of Holiday by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

18 U.S.C. §3401, discussed in the jurisdiction and powers section of the Act (§ 636) does not discuss civil proceedings in any form.

Remaining, then, is subsection (b)(3) of the Act which discusses additional duties of the magistrate. Petitioner urges that the language of that subsection is clear and concise and should be interpreted literally, this is,

> . . . The additional duties authorized by rules may include. .
>
> > (3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing* (Emphasis added).

The legislative history of the Act is somewhat instructive on the issue in question, in that it does not mention discussion of any provision for allowing magistrates the authority for holding evidentiary hearings on habeas corpus hearings. In point of fact, under the provision *Purpose of Legislation,* Vol. 3, 1968, U.S. Code Congressional and Administrative News, p. 4254, it is stated that:

> In summary, § 945 is intended both to update and make more effective a system that has not been altered basically for over a century, and to cull from the evergrowing workload of the U.S. district courts matters that are desirably performed by a ***lower tier*** of judicial officers (Emphasis added).

Petitioner believes also it is important to note that the "Great Writ" as the Writ of Habeas Corpus has been described is rooted deep in the common law and held to be "a precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnson*, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455 (1939): *Darr* v. *Burford*, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1956). It's origins are deep in English history and "it was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors" *Ex Parte Yerger*, 8 Wall, (75 U.S.) 85, 95, 19 L.Ed. 332.

Payne, supra, specifically applied itself to Commissioners and Special Masters and apparently reserved the question as it applies to magistrates (Footnote 1, p. 1193). The petitioner is not unmindful of a recent decision of the United States Court of Appeals for the Fifth Circuit, as yet unreported, wherein that Circuit held, more by inference than by direct language, that an evidentiary hearing before a magistrate is permissible where the district court, "upon his own independent examination of the record" denied the writ (*Johnson* v. *Wainwright*, Na 71-3103, February 25, 1972). There was no other discussion of the issues in the opinion. The facts of the

issue are basically the same as in *Payne*, supra, except a magistrate heard the evidence rather than a special master.

However, in *Rainha* v. *Cassidy*, 454 F.2d 207, January 13, 1972, the United States Court of Appeals for the First Circuit took issue with the district court's procedure of allowing a magistrate to hold an evidentiary hearing in a habeas corpus matter. At pages 207-208, the Court states:

> The court denied the stay without hearing the parties, relying on a magistrate's report of findings and recommendations based upon an evidentiary hearing before the magistrate. Petitioner appeals.
>
> We are troubled at the outset by this procedure. A magistrate has authority to do certain limited things, and to perform such further duties 'as are not inconsistent with the Constitution and laws of the United States,' as may be determined by the particular district court. 28 U.S.C. § 636(b). As a statutory example, we quote subsection (3).
>
> '(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.
>
> While the present case involves a habeas corpus proceeding of a different character, the thought that the magistrate, rather than recommending a hearing after a preliminary re-

view, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands by the district court without notice, does not appeal to us in the least.

We do not pursue this matter in the present case because a close questioning of counsel by the single judge of this court to whom a hearing on the application for stay was referred, discloses that in fact petitioner admitted the correctness of certain of respondent's testimony which we regard as foreclosing any possibility of success on petitioner's part.

CONCLUSION

The petitioner urges that the applicable law on this question is still as recited in *Holiday*, supra, and *Payne*, supra, and that the enactment of the *Federal Magistrates Act* has not altered its meaning in any way. The district judge except in special circumstances involving direct habeas corpus applications to Circuit Judges and the Supreme Court Justices is the person who has authority, by law, to hold evidentiary hearings on Petitions for Writ of Habeas Corpus.

WHEREFORE, the petitioner prays that this Court will enter an Order assigning this matter to be heard before a judge of the United States District Court for the Western District of Kentucky.

Respectfully submitted,

/s/ Joseph G. Glass
JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-7288

I hereby certify that a copy of the foregoing Memorandum of Law was mailed, postage prepaid to the Hon. Dale R. Booth, U. S. Magistrate, Federal Building, Louisville, Kentucky 40202, and the Hon. Ed W. Hancock, Attorney General, State Capitol Building, Frankfort, Kentucky 40601, on this 16th day of May, 1972.

/s/ Joseph G. Glass
JOSEPH G. GLASS

* * * * * * *

Entered May 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, **Petitioner**

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, **Respondent**

CIVIL ACTION NO. 2591-G

ORDER

Petitioner having filed a motion, supported by a Memorandum of Law, asking the court to disqualify the United States Magistrate from conducting the evidentiary hearing on the issues raised by petitioner, and to assign said hearing to a judge of the district court, the court having considered same, and being duly advised in all particulars, it is hereby ORDERED that said motion be, and it is hereby, overruled.

Date: 5/30/72

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:

Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,
Commonwealth of Kentucky

Honorable Joseph G. Glass
100 North Sixth Street
Burdorf Building
Louisville, Kentucky 40202
Attorney for Petitioner

John W. Wingo, Warden,
Kentucky State Penitentiary

* * * * * * *

Entered May 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, **Petitioner**

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary **Respondent**

CIVIL ACTION NO. 2591-G

ORDER

The evidentiary hearing set before the United States Magistrate commencing at 9:30 A.M., June 7, 1972, is hereby rescheduled for 1:30 P.M., June 26, 1972.

Date: May 31, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
Carl James Wedding, Petitioner

Ed W. Hancocks, Attorney General,
Commonwealth of Kentucky

Honorable Joseph G. Glass

100 North Sixth Street
Burdorf Building
Louisville, Kentucky 40202
Attorney for Petitioner

John W. Wingo, Warden,
Kentucky State Penitentiary
United States Marshal

* * * * * * *

Entered June 16, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

ORDER

The order entered May 1, 1972, amending by adding to paragraph (c)(3) of Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby rescinded.

Effective immediately, Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby amended by adding to paragraph (c)(3) as follows:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the

proper District Judge. Upon written request of either party, filed with ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration."

Date: June 16, 1972

/s/ James F. Gordon
James F. Gordon, Chief Judge
United States District Court

/s/ Rhodes Bratcher
Rhodes Bratcher, Judge
United States District Court

/s/Charles M. Allen
Charles M. Allen, Judge
United States District Court

/s/Mac Swinford
Mac Swinford, Judge
United States District Court

* * * * * * *

Entered June 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, **Petitioner**

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, **Respondent**

CIVIL ACTION NO. 2591-G

ORDER

The respondent having moved that the evidentiary hearing ordered in this case be held at the Courthouse in Dixon, Kentucky, and the petitioner through counsel concurring in such motion,

It is hereby ORDERED that the said evidentiary hearing be conducted at the Courthouse at 4:30 p.m. June 26, 1972, and the United States Marshal is directed to convey the petitioner to the hearing above scheduled and to return him to the Daviess County Jail at the conclusion thereof.

June 26, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
U. S. Marshal's Office

Honorable Joseph G. Glass
100 North Sixth Street
Burdorf Building
Louisville, Kentucky 40202
Attorney for Petitioner

Mr. Curran Clem, Assistant Attorney General,
Commonwealth of Kentucky
Capitol Building
Frankfort, Kentucky 40601

* * * * * * *

Entered June 30, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

ORDER

This case came on for an evidentiary hearing ordered by mandate of the Sixth Circuit. The hearing was conducted by the magistrate and commenced at 4:40 P.M., June 26, 1972, at the Courthouse, Dixon, Kentucky, having been set there at the request of counsel for respondent, concurred in by counsel for petitioner, and approved by the acting chief judge of this district.

The petitioner apeared in person and by appointed counsel, Honorable Joseph G. Glass. Respondent was represented by Honorable Curran Clem and Honorable James Ringo, Assistant Attorneys General, Commonwealth of Kentucky.

Petitioner testified and rested his case. W. Fred Hume was called as a witness for the respondent, was sworn and testified, and the respondent rested. All

testimony was recorded on electronic sound recording equipment.

Thereupon, the parties were advised that the magistrate would take the testimony under consideration, make findings of fact and conclusion of law and transmit them to the district judge to whom the case has been assigned. The parties were further advised that upon transmittal, each would be provided a copy thereof, and that within ten days of such date, either party could request that the district judge hear the recorded testimony and give it de novo consideration in determining the disposition of the petition.

The United States Marshal was directed to return the petitioner to the custody of the respondent pending final determination.

Date: June 30, 1972

/s/Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
James F. Gordon, Chief Judge,
Western District of Kentucky

Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,

Commonwealth of Kentucky

John W. Wingo, Warden,
Kentucky State Penitentiary

Honorable Joseph G. Glass,
Sixth and Main Streets
Burdorf Building
Louisville, Kentucky 40202

* * * * * * *

Entered August 30, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

ORDER

It is hereby ORDERED that the respondent, within ten (10) days from the entry of this order, file authenticated copies of all state court proceedings conducted in petitioner's case.

August 21, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
Mr. Joseph G. Glass, Attorney for Petitioner
6th & Main Street
Burdorf Building
Louisville, Kentucky 40202

Ed W. Hancock, Attorney General,
Commonwealth of Kentucky

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

REPORT AND RECOMMENDATION

Pursuant to Rule 16, as amended June 16, 1972, of the Rules of the United States District Court for the Western District of Kentucky, transmitted herewith is the report of the evidentiary hearing in this case with my Findings of Fact and Conclusions of Law.

It is my recommendation to the Honorable James F. Gordon, Chief Judge, that if neither party within ten (10) days from this date requests de novo consideration of the recording of the evidentiary hearing that an order be entered adopting as his own, these findings and conclusions (*Parnell* v. *Wainwright*, No. 72-1649, 5th Cir. decided July 20, 1972), and denying the petitioner's petition for writ of habeas corpus.

Date: September 14, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
Judge James F. Gordon
Joseph G. Glass, Counsel for Petitioner
Curran Clem, Assistant Attorney General,
Commonwealth of Kentucky

* * * * * * *

Filed September 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petitioner, Carl James Wedding, was permitted to file in forma pauperis a verified petition for writ of habeas corpus. The Court dismissed his petition on October 27, 1971, without granting him a hearing, and petitioner appealed. The Court of Appeals, Sixth Circuit, reversed, and by mandate dated March 16, 1972, remanded for an evidentiary hearing, holding that petitioner's assertions that counsel was appointed

the same day of trial, that he was not advised of his right to a jury trial, and that his guilty plea was coerced by threat of a possible death sentence, were issues of fact requiring such a hearing.

Pursuant to Rule 16, as amended, Rules of the United States District Court for the Western District of Kentucky, extract of which is attached, the full-time United States Magistrate for this district, held an evidentiary hearing on June 26, 1972. Petitioner's objection that the Magistrate lacked the authority to conduct the hearing was overruled by the District Judge. The petitioner appeared in person at the hearing represented by court appointed counsel, Honorable Joseph G. Glass, and the respondent was represented by the Honorable Curran Clem and the Honorable James Ringo, Assistant Attorneys General, Commonwealth of Kentucky. The petitioner testified and rested his case. The respondent presented the testimony of the Honorable W. Fred Hume, a member of the Webster County bar, and rested. All testimony was recorded by an Edison Voicewriter, and the discs containing the recorded testimony are filed with the records of the case.

The petitioner alleges that he is currently serving a sentence of life imprisonment imposed upon him in the Webster Circuit Court on April 25, 1949, following his plea of guilty to wilfull murder. At page 3 the petition alleges that counsel consulted with petitioner only ten minutes prior to trial. At page 4 it is alleged that counsel was appointed ten minutes prior to trial. He alleged on page 7 that he was coerced into entering

an involuntary plea of guilty without alleging any specifics. At page 8 he states he was tricked and coerced by the prosecuting attorney and that his "ineffective" counsel advised him to enter a plea of guilty. At page 2 he alleged that he was not advised of his rights to a jury trial where he could have received a two-year sentence for voluntary manslaughter.

At the evidentiary hearing petitioner testified that he was 'locked up' on March 27, 1949, and that he did not see an attorney until April 25, the day he was tried, convicted, and taken to the penitentiary, and that Mr. Cass Walker was appointed to defend him about ten minutes before trial. He testified that he did not think Mr. Hume was one of his counsel, at least he saw no one other than Mr. Walker. He testified that he tried to get Mr. Walker to "lay it over" because he wanted to go to trial, but that Mr. Walker was unable to accomplish this. He responded in the negative when asked if he was advised of his right to a jury trial or if he was aware that he had such a right. He testified that he appeared in court on one occasion only and that was when he entered his plea. Under cross examination he testified that he knew he had a right to a trial, but that was not what his attorney told him. He later explained in his testimony that he had hoped for a continuance so that his attorney could get better prepared and if he had gone to trial he probably would not have received over two years. But, he felt that he had to do what his attorney said.

Petitioner testified with regard to his plea that he pleaded guilty because his attorney told him it was

either that or the death penalty. Petitioner offered no testimony as to any threat from the Commonwealth's attorney. On the contrary, he testified that he didn't believe Mr. Walker had any discussions with the Commonwealth's attorney.

Mr. W. Fred Hume testified that he has been practicing law in Providence since 1932. He stated that on arraignment day, the 14th of April, Judge Marvin Blackwell appointed him and Cass Walker to represent the petitioner, and he, Cass Walker, petitioner, and petitioner's father went into the Judge's chambers and discussed the case. Mr. Walker, who was from petitioner's home town and knew the family quite well, did most of the talking, and most of it was with petitioner's father. At this meeting it was agreed that Walker would get the case, which had already been set for trial, continued for a week or ten days, and that petitioner's father would get one hundred dollars to give to Walker. The case was continued for a week or so, and on the day of the trial, April 25, the four again met together, Walker got the one hundred dollars and they discussed the case some more. On each occasion petitioner was rather uncommunicative and Hume was not sure whether this was because petitioner did not remember much about the incident or whether the father did most of the talking in order to shield his son. Petitioner and his uncle had argued over a "jug of whiskey", the uncle was killed and petitioner did not remember anything in particular about the incident. There were no witnesses to be found. Walker advised them that under the circum-

stances of the case and the lack of a defense, he should plead guilty because of the possibility of the death sentence, and the father agreed that this was best. Petitioner did not voice any opposition and they went into the courtroom where petitioner personally entered his plea of guilty. Walker was well acquainted with the family and was probably aware of petitioner's record. He further testified that Walker handled most of the case, that they could not offer any defense, that petitioner was well aware of his right to a trial on the issues by jury, but that under the circumstances a plea of guilty was the best course of action.

Subsequent to the hearing the respondent was ordered to file the available state court records, and he has now filed a copy of the indictment, order of indictment, arraignment order, three defendant and one Commonwealth subpoenas, order of continuance, jury instructions and trial order. These exhibits establish the sequence of the defendant's case. He was indicted April 5, 1949, and upon arraignment on April 6 entered a plea of not guilty, and trial was set for April 13. On April 6, eleven witnesses were subpoenaed to testify on behalf of the defendant and four on behalf of the Commonwealth. When the case was called on April 13, the court found that the defendant was unable to and had not employed counsel. Attorneys C. L. Walker and W. Fred Hume were appointed to defend petitioner and on motion of the defendant the trial was reset for April 25. On April 25 petitioner was permitted to withdraw his plea of not guilty, and

to enter a plea of guilty and was sentenced to a life term.

Other records in the case file reveal that petitioner was sentenced to five years in 1931 for robbery and again in 1935 he received a two-year sentence for pandering.

Whatever dispute may have existed as a result of the conflicting testimony of petitioner and Hume, it is, with one exception, completely resolved by the state records. They show, as Mr. Hume testified, that he and Walker were appointed to represent petitioner, not just Walker as petitioner testified. They further show that they were appointed twelve (12) days prior to trial, as Hume testified to, not the twenty minutes testified to and alleged by petitioner. They further show that petitioner made three court appearances, rather than only on one occasion, as testified to by the petitioner. They show further that the case was originally set for April 13 and continued on defense motion to April 25 as testified to by Hume, and contrary to petitioner's testimony. In short, as to each of these issues, not only has petitioner's testimony been contradicted by Hume's testimony as to his recollection of the events, but Hume's testimony has been corroborated by the state court records.

This leaves in issue only the number and length of the consultations between petitioner and his counsel, the gist of those conversations and the manner in which they may have caused petitioner to enter a plea of guilty. Obviously the state records cannot shed

any light in this regard. It is, however, of utmost significance that where the records could corroborate, they supported Hume in every instance rather than the assertions of petitioner. They clearly show that Hume's recollections of the events of twenty-two years ago were correct and that petitioner's were incorrect. Thus, it is clear that Hume's memory withstood the test of time and his veracity has been established, and petitioner's have not. This, I believe, completely destroys petitioner's credibility. It is therefor more reasonable to believe Hume's testimony that petitioner's counsel did consult with him on two occasions, rather than the ten minutes testified to by petitioner, that petitioner was well aware that the choice of a jury trial was his, as he tacitly admitted, that he was fully aware of the options available to him, and that he chose freely and voluntarily to plead guilty to avoid the probability of conviction and the possibility of a death sentence.

To believe otherwise would fly in the face of reason because not once has the record substantiated a significant allegation made by the petitioner.

Therefor, I find upon examination of all pleadings, exhibits, state records, and the evidence at the evidentiary hearing afforded petitioner that:

a. Attorneys Cass L. Walker and W. Fred Hume were appointed to represent the petitioner twelve days before he entered his plea of guilty to the charge of wilfull murder;

b. Attorneys Cass L. Walker and W. Fred Hume consulted with petitioner concerning his case on two occasions prior to the entry of said plea of guilty;

c. Petitioner had the effective advice and assistance of competent counsel from the time of their appointment to and including the entry of the plea and imposition of sentence;

d. Petitioner was informed of and fully aware that he could enter a plea of not guilty and receive a trial by jury on the issues;

e. Petitioner knowingly, voluntarily and of his free volition waived that right and entered a plea of guilty to the charge;

f. No coercion, unlawful influence or inducement was used or exerted against him by his attorneys or the Commonwealth's attorney to obtain the plea of guilty;

g. Petitioner's apprehension of the death penalty did not render his plea involuntary, his plea being motivated because of his desire to eliminate that distinct possibility in the face of almost certain conviction and his prior felony convictions.

Petitioner bears the burden of in a habeas proceedings to establish a deprivation of constitutional rights. *Humphries* v. *Green*, 397 F.2d 67 (6th Cir. 1968); *Stock* v. *Bomar*, 354 F. 2d 200 (6th Cir. 1965). This, he has failed to do. His allegation that counsel was appointed twenty minutes before trial has been shown to be false beyond peradventure of doubt. Also shown to

be false is his denial that Hume represented him and that he, the petitioner, was in court on the charge on one occasion only. Also shown to be false in his denial that no continuance was granted him. The consistent falsity on these material points makes him completely unbelievable on the other pertinent allegations which were contradicted by Hume's testimony but could not be further contradicted by records. Petitioner knew he had a right to a jury trial. He admitted as much. He had been convicted of felonies twice before. He wanted, and got, a continuance to prepare for a jury trial, but changed his mind, in my opinion, because the weakness or lack of a defense made the risk of a death sentence unacceptable to him. If his attorney misjudged the probability of a death sentence, and the correctness of his assessment will forever be conjecture only, that alone, which under the most liberal interpretation to petitioner is a possibility only, would not render his plea involuntary, *Brady* v. *United States,* 397 U.S. 742 (1969) nor would it establish that his counsel was ineffective. Perfection by counsel is not required. *McMann* v. *Richardson,* 397 U.S. 759 (1970). It is not improper for an attorney to advise his client of the possible sentences which may be adjudged upon conviction. Indeed, he would be derelict if he failed to do so.

It is my conclusion that petitioner has failed to establish that any constitutionally protected right has been violated. It is my recommendation that the petition be dismissed.

Date: September 14, 1972

/s/Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:
Judge James F. Gordon

Joseph G. Glass, Counsel for Petitioner

Curran Clem, Assistant Attorney General,
Commonwealth of Kentucky

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

REQUEST

Comes the petitioner, CARL JAMES WEDDING, by counsel, and prays that this Honorable Court will hear the recorded testimony given at the evidentiary hearing in the matter herein, and thereafter, consider

this matter de novo, pursuant to Rule 16(c) (3) of the Rules of the United States District Court for the Western District of Kentucky.

Respectfully submitted,

JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-7288

I hereby certify that a copy of the foregoing Request was mailed to the Hon. Curran Clem, Assistant Attorney General, Frankfort, Kentucky 40601, on this 22nd day of September, 1972.

JOSEPH G. GLASS

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

MEMORANDUM

The petitioner, CARL JAMES WEDDING, on September 22, 1972, filed his request that this Court consider the testimony in this matter de novo pursuant to Rule 16 (c) (3) of the Rules of the United States Court for the Western District of Kentucky.

In support of his request, the petitioner files herewith his Memorandum concerning testimony of the evidentiary hearing held on June 26, 1972, at Dixon, Webster County, Kentucky.

From the testimony received at that hearing, the petitioner can readily understand how a Court might consider the petitioner's credibility concerning discussions with counsel and appearances in Court. However, petitioner urges that a careful examination of the testimony of the Honorable W. Fred Hume, might help clarify some of the Court's misgivings.

It is uncontroverted that the petitioner was continuously incarcerated in the Webster County Jail from approximately March 27, 1949, through April 25, 1949, his day of "trial." There is disputed testimony concerning the consultations which the petitioner had with Court-appointed counsel during the period from indictment, April 6, 1949, to "trial," April 25, 1949. It would appear from the record furnished by the Commonwealth that the petitioner was arraigned, with others, on April 6, 1949. The petitioner has denied this Court appearance, however, for sake of argument it would appear that the petitioner must concede the point in favor of the Court's record. However, even if there was a brief appearance on April 6, it was of little consequence since the matter was merely continued until April 13, 1949, for trial.

On April 13, 1949, by Order, the Circuit Judge appointed the Hon. C. L. Walker and the Hon. W. Fred Hume to represent the petitioner. It is at this point that Mr. Hume's testimony at the June 26, 1972 hearing becomes instructive. Mr. Hume's own recollection of the part that he played in the case indicates that he was simply playing an unimportant role. It is apparent that Attorney Walker controlled the handling of the matter. There apparently was some considerable discussion concerning a retainer fee of One Hundred ($100.00) Dollars. As a matter of fact Hume acknowledged that Walker talked only with Wedding's father at the first meeting and that Wedding did not participate in any discussions. According to Hume's testimony, Walker proceeded to tell the petitioner

and his father that the petitioner should enter a plea of guilty, because there was the possibility of the petitioner receiving the death penalty. Ironically, in response to a question, Mr. Hume acknowledged that there has never been a death verdict rendered by a Webster County jury. It is conceded that there could always be a first time for such a verdict but apparently based upon past jury performance the chances should have seemed remote.

Hume's description of Wedding included such statements as ". . . he is not a smart man, he is anything but."; ". . . why he (Walker) didn't try to get more out of Carl I don't know, but from the answers that I heard, I don't think Carl could have told him anything about what happened."; "Yes, he did talk some, yes but you couldn't make — you couldn't put two and two together from it."

Hume in his testimony indicated in several places that the discussions about the case, such as they were, occurred almost entirely with the petitioner's father, with little or no participation from the petitioner. It would appear that *any* communication that may have been received from the petitioner was either unintelligible or unintelligent. In either event, the petitioner was not an active participant in the case.

The petitioner prays that one very obvious fact will appear from the review of the testimony of the evidentiary hearing i.e., that neither of the attorneys, C. L. Walker or W. Fred Hume, were prepared for a

trial in this case. It does not really matter that they were appointed on April 13, 1949, and the case was continued until April 25, 1949, if they did, nothing in the intervening time for the benefit of their client. The case could have been continued a year, or ten, without benefit to the client if the attorneys did no preparation on their client's behalf.

Carl Wedding was incarcerated in the Webster County jail for thirty (30) days before his "trial" date. For twelve (12) of those days he had two Court-appointed attorneys, and yet neither went to see him at the jail. The only two times the attorneys saw Wedding was when he was brought to the Courthouse, and then only briefly.

Does it really matter in this case whether the conferences were for ten minutes or thirty minutes? It would matter if the argument involved the difference between ten minutes and six hours. Thirty minutes, more or less, is just no time at all to evaluate a case of a man charged with murder.

Of equal importance is the fact that Wedding's attorneys did not really do him any legal favors. It is true that the death penalty was possible for the crime charged. But it was also true, and apparently still is, that such a penalty would not be imposed by any Webster jury. Hume acknowledged this fact at the June 26, 1972, hearing.

If, through plea bargaining, the attorneys had succeeded in securing a greatly reduced sentence in return for a guilty plea then the attorneys would have

been efficient and effective. Even if they had reduced the penalty by one "notch" some argument could be made in their favor. However, this was not the case — for some reason, the attorneys in their efficient and effective way, were able to secure, through plea bargaining, the maximum sentence which had ever been meted out under this same charge.

It just does not seem conceivable that this representation approaches adequate representation. Plea bargaining is now, and was in 1949, an accepted form of practice in Kentucky Courts. It has only been within the last five years or less that the State Circuit Judges have begun to follow a format similar to that practiced in United States District Courts, wherein the Judge has complete control of the sentence. Even so, the plea negotiations are still favored in the Kentucky Courts. In point of fact, it has been recommended, by Memorandum from the Kentucky Attorney General's office, dated December 30, 1971, that plea negotiations be reduced to writing for signature by the parties to the case, i.e., prosecuting attorney, witness, defense counsel and, most importantly, the defendant.

The petitioner believes that when this Court reviews this matter, it will become apparent that the attorneys handling the case in 1949 were simply trying to dispose of an *appointed* case in the most expeditious manner possible. Such actions are not uncommon today.

As the petitioner has pointed out, he received the maximum sentence ever imposed, by court or jury, on his plea of guilty. Certainly a questionable occurrence.

Counsel also knows that it is not possible to second guess what a jury might have done in a given instance. However, reviewing the facts of this case wherein an uncle was killed by a nephew, where both were evidently figthing over a bottle of whiskey, it hardly seems the type of case that would have sent the townspeople to the wailing wall or filled the county with moral indignation. In other words, it would certainly appear at first and second blush, that a more favorable settlement could have been reached if *any* attempt had been made.

The cases are replete that described ineffective assistance of counsel. Counsel knows that the Court is familiar with the theories and believes that a recitation of cases would serve no purpose in this Memorandum.

The Court of Appeals for the Sixth Circuit in *Wedding* v. *Wingo* (71-2090) discussed the three issues mentioned by the Magistrate in his opinion, i.e., assertions that counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

The petitioner prays that through this Memorandum he has covered these points for this Court. In summary, it does not really matter whether the ten to thirty minutes of conference was spent on one day or two days if a realistic portrayal of the case cannot or is not presented. If there was any consideration of the jury question it would have been by negative inference rather than direct discussion because of the subtleties surrounding the death penalty question.

WHEREFORE, it is prayed that this Court, after a review of the transcription herein, will direct that the Writ of Habeas Corpus issue and thereafter direct the respondent to release the petitioner from his custody.

Respectfully submitted,

/s/ Joseph G. Glass
JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-72-88

I hereby certify that a copy of the foregoing Memorandum was mailed postage prepaid to the Hon. Dale R. Booth, U. S. Magistrate, U.S. Courthouse, Post Office, Fourth Floor, Broadway at Sixth Street, Louisville, Kentucky 40201; and the Hon. Curran Clem, and James Ringo, Assistant Attorneys General, State Capitol Building, Frankfort, Kentucky 40601, on this 26th day of September, 1972.

/s/ Joseph G. Glass
JOSEPH G. GLASS

* * * * * * *

Entered October 11, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

ORDER

The Court having considered all the pleadings in this case and having read and considered the Magistrate's Findings of Fact and Conclusions of Law filed herein on September 14, 1972, and his Report and Recomendation thereon, and upon motion of the petitioner having heard the recorded testimony of the evidentiary hearing accorded the petitioner, and having considered same and given such testimony de novo consideration and being duly advised in all the premises,

It is hereby ORDERED that the said Findings of Fact and Conclusions of law filed by the Magistrate be, and they are, hereby adopted and restated by the undersigned as his own Findings of Fact and Conclusions of Law, and the petition for writ of habeas corpus is hereby ORDERED dismissed.

Date: October 10, 1972

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:
Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,
Commonwealth of Kentucky

John W. Wingo, Warden
Kentucky State Penitentiary

Honorable Joseph G. Glass
United States Magistrate

* * * * * * * *

No. 72-2160.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING,

Petitioner-Appellant,

v.

JOHN W. WINGO,

Respondent-Appellee.

APPEAL from United States District Court for the Western District of Kentucky.
Decided and Filed August 31, 1973.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Circuit Judge. Wedding appeals from the denial by the District Court of his petition for a writ of habeas corpus after an evidentiary hearing conducted by a United States Magistrate. Wedding is presently serving a life sentence imposed in 1949 by the Webster Circuit Court of Kentucky after a plea of guilty to a charge of murder. He had filed his petition for the writ in the District Court in 1971, alleging among other things that his counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

Wedding's petition was denied without a hearing. He appealed to this Court and we reversed and remanded with instructions to conduct an evidentiary hearing on the petitioner's claims of constitutional violation. 456 F.2d 245 (6th Cir. 1972).

Upon remand, a United States Magistrate, acting pursuant to a rule adopted by the District Court, issued an order assigning the evidentiary hearing to himself. Prior to this hearing, however, the petitioner moved to disqualify the Magistrate from holding such hearing on the ground that a Magistrate was not authorized and empowered under authority of the Federal Magistrates Act of 1968 (28 U.S.C. § § 631 to 639 (1973 supp.)) to hold evidentiary hearings. That motion was overruled by the District Court.

The evidentiary hearing was then conducted by the Magistrate on June 26, 1972, at which time an electronic recording was made of the testimony of the witnesses. Thereafter the Magistrate adopted findings of fact and conclusions of law, in writing, ruling that no constitutional right of petitioner had been violated, and recommending that the petition be dismissed. The Magistrate submitted to the Court his findings and conclusions, together with a recording (a plastic phonograph record) of the proceedings.

The petitioner moved to have the Court give the matter de novo consideration. The Court listened to the recording and adopted the findings of fact and conclusions of law of the Magistrate as his own, and dismissed the petition as without merit.

The petitioner has again appealed to this Court, contending that the proceedings of the District Court were invalid because the United States Magistrate had no authority under the Act to conduct an evidentiary hearing on his habeas corpus petition. We agree.

The Federal Magistrates Act of 1968, 28 U.S.C. § § 631 to 639 (1973 Supp.) provides in relevant part:

"...

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the appliable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for postrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate

the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." (28 U.S.C. § 636 (1973 Supp.))

Pursuant to this statute, the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c) (3) the following:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either part, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it do novo consideration."

The interpretation by the rule which the Western District of Kentucky has placed upon the congressional grant of power to United States Magistrates is, in our opinion, incorrect.[1] The Act granted authority to the Magistrate to conduct only a preliminary review of applications for post-trial relief in order to facilitate the decision of the District Court as to whether there should be a hearing. This Court, in its mandate, had already directed that an evidentiary hearing be conducted. This rule of the District Court, quoted above, attempts to expand the jurisdiction of the Magistrate and, as will be pointed out, conflicts with the Act, and is therefore invalid.

Our analysis begins with *Holiday* v. *Johnson*, 313 U.S. 342 (1941), wherein the Court assessed the respondent's claim that a United States Commissioner (the predecessor of the United States Magistrate) could conduct evidentiary hearings for habeas corpus by virtue of Rule 53(a) and (b) of the Rules of Civil Procedure. The Court stated:

> "It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal com-

1. Because the Magistrates Act of 1968 cannot be interpreted to permit the procedure adopted by the Western District of Kentucky, we need not decide whether it would be permissible constitutionally for Congress to invest power to hold habeas corpus hearings in an official who is outside the pale of Article III of the Constitution. See, however, *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 352-354 (7th Cir. 1972).

pliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district court in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53 (a) (b) of the Rules of Civil Procedure.

"We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." (313 U.S. at 351-352).

By virtue of *Holiday*, the conduct of habeas corpus hearings by United States Commissioners become a dead issue.

Subsequently, however, Congress modified the habeas corpus statute so the provide that "[t]he *court* shall summarily hear and determine the facts, and dispose of the matter as law and justice require", rather than "[t]he *court*, or *justice* or *judge*, shall proceed in a summary way to determine the facts of the case . . ." as was formerly provided. 28 U.S.C. § 2243 (1971). (Emphasis added.) The same judicial district involved in this case, the Western District of Kentucky interpreted this modification of the habeas corpus statute as a new authorization by Congress to have officers other than United States Judges, hold habeas corpus evidentiary hearings.

In *Payne* v. *Wingo*, 442 F.2d 1192 (6th Cir. 1971), we squarely rejected this interpretation. We stated therein:

> "When Congress retained the reference to the 'court' in the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of *Holiday* by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.
>
> . . .
>
> "We realize that our decision in this case does not help alleviate the tremendous and increasing burden which the expanding number of

> habeas corpus petitions places on United States District Judges. Nevertheless, we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a clear mandate from Congress, we cannot presume, that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary." (Footnotes omitted) (422 F.2d at 1194-1195).

It is within this context that the interpretation placed upon 28 U.S.C. § 636(b) (1973 Supp.) by the Western District of Kentucky must be analyzed.

The respondent implicitly concedes that authorization for Magistrates to hold evidentiary hearings on habeas corpus petitions is not found in subpart (3) of 28 U.S.C. § 636(b) (1973 Supp.) That section clearly limits the duties of a Magistrate to a review of habeas corpus applications "to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" (Emphasis added.) 28 U.S.C. § 636(b)(3) (1973 Supp.) Respondent's construction actually conflicts with the plain language of this subsection.

However, respondent relies upon language immediately preceding subpart (3) of Section 636(b) for authorization of evidentiary hearings by Magistrates. In introducing the explicity granted powers of United States Magistrates, Congress stated:

> "The additional duties authorized by rule [of a judicial district] include, *but are not limited to* — . . ." (Emphasis added) 28 U.S.C. § 636(b) (1973 Supp.).

From this language respondent deduces that Congress invested in extra-judicial officials trial powers which it had for so many years withheld. The inaccuracy of this deduction is manifest.

If Congress intended such a sweeping and far-reaching result certainly it would have indicated this clearly and positively within the body of the Magistrates Act of 1968. *Cf., Buckeye Power, Inc.* v. *Environmental Protection Agency*, __ F.2d __ (6th Cir. No. 72-1628, June 28, 1973) Slip Opinion at 9.

More important, such an interpretation runs directly counter to the well-established doctrine of statutory construction denominated *ejusdem generis*. This doctrine directs that a general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope. The Supreme Court in *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957), articulated the rule as follows:

> "[T]he law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107."

Therefore, although the Magistrates Act of 1968 provides that Magistrates are "not restricted to" the three powers explicitly outlined in the Act, by virtue of *ejusdem generis* those three powers are exclusive on the topics which they cover. Accordingly, insofar as habeas corpus

is concerned, Magistrates have only power to assist the District Judge in determining "whether there should be a hearing." 28 U.S.C. § 636(b)(3)(1973 Supp.).

The legislative history of Section 636(b) of 28 U.S.C. supports this proposition. The original draft of the subsection in the Senate Bill provided that the Magistrate could give:

> "...
> (3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses."

The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):

> "The Committee is of the opinion that the enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack. . . ." (Hearings on S.3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241n.)

In order to foreclose a broad interpretation of Section 636 (b) (3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, "preliminary consideration of applications for post-trial relief" in the Bill was narrowed to "preliminary review" of the applications and the power and authority of the Magistrate was restricted to "submission of a report and recommendations to facilitate

the decision of the district judge" only as to "whether there should be a hearing." It was in this amended and narrowed form that the Act was passed by Congress.

Contemplating the possibility that this Court might reject its argument that a Magistrate has the power to conduct evidentiary hearings for habeas corpus, the respondent advances a second, alternative argument in support of the proceedings below. In its brief, respondent states:

> "In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it de novo consideration as the petitioner, in this case, requested.
>
> "The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate."

To the extent that the respondent argues that the petitioner was given an evidentiary hearing "before a district judge" because he (the Judge) thereafter listened to a sound recording of the hearing before the Magistrate, we are not persuaded.[2] With equal propriety it could be argued that any civil case could be

2. It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

heard by a Magistrate and the Judge could later decide the case by listening to the sound recording. The Magistrate would indeed become an Assistant Judge.

Rule 52(a) of the Federal Rules of Civil Procedure provides that a District Judge, sitting without a jury, is to make findings of fact and that these findings are not to be set aside by an appellate court unless they are clearly erroneous. The principle which underlies this rule was expressed by the Supreme Court in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949), as follows:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who *see* and hear them." (Emphasis added).

Deference is given to the factual findings of a trial judge because he has seen and observed the *demeanor* of the witnesses, and their "[o]utword manner or comportment." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1956). Listening to a sound recording of the testimony of a witness does not permit a Judge to see and observe the demeanor of witnesses and make credibility determinations therefrom.

Furthermore, it must be noted that an essential ingredient of a hearing before a Judge without a jury is the opportunity afforded to the Judge for questioning of witnesses. By his questioning of witnesses the Judge can clarify matters of evidence which are unclear; he can rule on objects made by the parties; and in the interest of justice he can made sure that both parties have had a fair hearing. By seeing and hearing the witnesses he will be in a much better position

to make credibility determinations. Needless to say, the District Judge in this case could not ask questions of the sound recording. In our opinion, Wedding had the right to have his case heard by an Article III Judge.

In sum, petitioner did not have a hearing before a District Judge, either in form or in substance, as we ordered in our mandate.

In regard to the entire posture of this case, a recent admonition of this Court should be borne in mind. In *Ingram* v. *Richardson*, 471 F.2d 1268 (6th Cir. 1972), we stated:

> "Crowded court calendars may be a problem in the United States District Court for Eastern District of Kentucky. Reference of cases to Magistrates, however, is not the proper solution of the problem. . . . [T]he problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review *by a court.*" (Emphasis added). (471 F.2d at 1281).

We vacate the judgment of dismissal and remand the case with instructions that the Court itself hold an evidentiary hearing on petitioner's constitutional claims.[3]

---

3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. *Gonzalez* v. *Zelker*, ___ F.2d ___ (2d Cir. No. 72-1945, Apr. 17, 1973); *Johnson* v. *Wainwright*, 456 F.2d 1200 (5th Cir. 1972); *Parnell* v. *Wainwright*, 464 F.2d 735 (5th Cir. 1972); *United States* v. *King*, 455 F.2d 345 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no questions as to the legality of reference was raised or passed upon by the Courts.

In so doing, we are impelled to note that the phonographic record of the evidentiary hearing was made a part of the record to this Court, apparently in lieu of a transcript. Such procedure was unauthorized. It renders impossible a review by this Court of the record without listening to the sound recording, and it contravenes Rule 10 of the Federal Rules of Appellate Procedure and Rule 10 of this Court.

Vacated and remanded.

* * * * * * *

Supreme Court of the United States

No. 73-846

John W. Wingo, Warden,

Petitioner,

v.

Carl James Wedding

ORDER ALLOWING CERTIORARI. Filed January 21 ---------- , 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ----------Circuit is granted.

FILE COPY

FILED

NOV 29 1973

MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-846

JOHN W. WINGO, WARDEN
KENTUCKY STATE REFORMATORY
LaGRANGE, KENTUCKY ..... PETITIONER

vs.

CARL JAMES WEDDING ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

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KENTUCKY STATE REFORMATORY
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vs.

CARL JAMES WEDDING ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, John W. Wingo, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided August 31, 1973.

OPINION BELOW

The judgment and order of the United States Court for the Sixth Circuit is reported as *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on August 31, 1973. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE FEDERAL MAGISTRATES ACT, 28 U.S.C. § 631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. § 2241 ET SEQ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes which are involved here are: 28 U.S.C. § 2241, et seq., which is the statutory codifcation of Federal habeas corpus; and 28 U.S.C. § 631, et seq., which is the Federal Magistrates Act, and particularly 28 U.S.C. § 636 (b).

The provision of the constitutional provision involved is Article III of the United States Constitution which vests the judicial power of the United States.

STATEMENT OF THE CASE

Respondent is presently serving a life sentence imposed in 1949 by the Webster Circuit Court, Com-

monwealth of Kentucky, after entry of a plea of guilty to murder.

Pursuant to Kentucky Criminal Rule 11.42, the respondent, in 1970, filed a motion to vacate this sentence in the Webster Circuit Court which was denied without a hearing. That order was affirmed by the Kentucky Court of Appeals, *Wedding* v. *Commonwealth*, Ky., 468 S.W.2d 273 (1971).

Thereafter, the respondent, pro se, filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to provisions contained in 28 U.S.C. § 2241, et seq. The District Court entered an order dismissing the petition. The respondent appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the lower court and remanded the matter to the District Court for the holding of an evidentiary hearing.

Pursuant to Rule 16 (c)(3), Rules of the United States District Court for the Western District of Kentucky, the District Court assigned the matter of the evidentiary hearing to the United States Magistrate. Prior to the holding of the evidentiary hearing the respondent moved to disqualify the Magistrate from holding such hearing on the grounds that the Magistrate was not empowered to hold evidentiary hearings under authority of the Federal Magistrates Act, 28 U.S.C. § 631, et seq. That motion was overruled by the District Court.

An evidentiary hearing was held on June 26, 1972 before the United States Magistrate, sitting specially at Dixon, Webster County, Kentucky. Thereafter, the Magistrate provided the District Court with his Findings of Fact and Conclusions of Law, recommending that respondent's petition be dismissed. Respondent, under Rule 16(c)(3) of the Rules of the United States District Court for the Western District of Kentucky, requested that the District Court consider the matter de novo. Thereafter, the District Court entered an order dismissing respondent's petition for Writ of Habeas Corpus. Respondent appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit once again reversed the decision of the District Court by vacating the judgment of dismissal and remanded the case with instructions that the District Court itself hold an evidentiary hearing on respondent's constitutional claims. *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir. 1973). It is from this Order that a review is sought.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important question of federal law which has not been, but should be, decided by this Court.

Reason for this Court granting the Writ is set out in footnote three (3) of the Sixth Circuit's Opinion in the instant case, *Wedding* v. *Wingo*, supra, at page 1137:

"3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973); Johnson v. Wainwright, 456 F.2d 1200 (5th Cir. 1972); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972); United States v. King, 455 F.2d 435 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no question as to the legality of reference was raised or passed upon by the Courts."

The Sixth Circuit has decided that the Federal Magistrates Act, 28 U.S.C. § 631 et seq., does not empower United States Magistrates to conduct evidentiary hearings on federal habeas corpus petitions.

Thus, there is present a conflict between the Circuit Courts of Appeal. The Sixth Circuit, by decision, has held that Magistrates cannot conduct evidentiary hearings on federal habeas corpus petitions. The First, Second, and Fifth Circuits, by practice, have held that Magistrates can conduct such hearings.

It is necessary that this conflict be settled by this Court in order that there might be uniformity of practice and decisions in the Federal Courts as to Whether a Magistrate is empowered to conduct evidentiary hearings on habeas corpus petitions by the Federal Magistrates Act, 28 U.S.C. § 631 et seq.

Petitioner submits that the United States Magistrates are empowered to hold evidentiary hearings on federal habeas corpus petitions. Authority for this

can be found in the Federal Magistrates Act, 28 U.S.C. § 636 (b), which states:

> "(b) *Any district court of the United States, by the concurrence of a majority of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate,* or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, *may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.* The additional duties authorized by rule *may* include, *but are not restricted* to —
>
> "(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> "(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." (Emphasis added.)

This section authorizes the district court to establish rules from which United States Magistrates may be assigned additional duties as long as these duties are not inconsistent with the Constitution and

the laws of the United States. The section (28 U.S.C. § 636(b)) then provides: ". . . additional duties authorized by rule *may* include, *but are not restricted to.*"

By inserting this provision, Congress made this section purposely broad to enable the United States District Courts to effectively utilize the Magistrates by assigning them additional duties so long as these duties were consistent with the Constitution and the laws of the United States.

In *TPO, Incorporated* v. *McMillen*, 460 F.2d 348 (7th Cir. 1972), the Seventh Circuit, in discussing the legislative history of the Federal Magistrates Act, quoted from one of the Senate Hearings on the Act when it stated at pages 355 and 356:

> "The subcommittee staff also prepared a memorandum dated April 28, 1966, which accompanied the preliminary draft and commented on 'new functions' as follows:
>
> "'The bill authorizes the district courts to assign full-time magistrates such additional duties *as are consistent with their non-Article III status* (subcommittee emphasis). The provision lists *by way of suggestion rather than requirement* (emphasis ours), the following: supervision of pretrial discovery proceedings in both civil and criminal cases; the holding of pretrial hearings; preliminary review of petitions for post-conviction relief; assignments to act as special masters in appropriate civil cases.'" [footnote omitted]

Petitioner submits that the three additional duties which Congress set forth in 28 U.S.C. § 636(b) were

suggested duties, not required duties. For this reason, these suggested additional duties cannot be reasonably interpreted to be "exclusive on the topics which they cover" as the Sixth Circuit held them to be. *Wedding* v. *Wingo, supra* at page 1135.

On June 16, 1972, all the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c)(3) as follows:

"O R D E R"

"The order entered May 1, 1972, amending by adding to paragraph (c)(3) of Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby rescinded.

"Effective immediately, Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby amended by adding to paragraph (c)(3) as follows:

"'In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to

the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration.'

"Date: June 16, 1972

"/s/ James F. Gordon
James F. Gordon, Chief Judge
United States District Court

"/s/ Rhodes Bratcher, Judge
Rhodes Bratcher, Judge
United States District Court

"/s/ Charles M. Allen
Charles M. Allen, Judge
United States District Court

"/s/ Mac Swinford
Mac Swinford, Judge
United States District Court"

"ENTERED June 16, 1972"

Thus, pursuant to 28 U.S.C. § 636(b), the district court judges of the Western District of Kentucky established a rule in which the United States Magistrate

of that district was assigned the additional duty of scheduling and hearing evidentiary matters which he deemed necessary to the determination of the merits of petitions for habeas corpus from state prisoners. At such evidentiary hearing, the United States Magistrate was to record the testimony on electronic sound recording equipment and then make *proposed* findings of facts and conclusions of law to the proper judge for his consideration. These would then be expeditiously given to the judge, along with the transcript of the proceedings and the sound recording of the testimony, for his independent consideration and ultimate determination of the state prisoner's petition.

If, upon written request of either party, filed within ten days from the date such is transmitted to the proper District Judge, that judge shall hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration.

The new amendment to Rule 16 added to paragraph (c)(3) is the procedure which was followed in the instant case and was the basis of the respondent's objection in his Sixth Circuit appeal.

In *Holiday* v. *Johnston*, 313 U.S. 342, 61 S.Ct. 1015, 85 L.ed 1392 (1941), this Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions.

In *Payne* v. *Wingo*, 442 F.2d 1192 (6th Cir. 1971), the Sixth Circuit held that there was "no authority for the delegation of the conduct of a habeas corpus evidentiary hearing to a Special Master."

In *Holiday*, supra, the hearing was conducted by a United States Commissioner and *Payne*, supra, by a United States Commissioner appointed as a Special Master. Neither case involved a hearing conducted by a United States Magistrate.

Holiday, supra, 313 U.S. at 352, which was decided before enactment of the *1968 Federal Magistrates Act*, stated:

> "One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts. 313 U.S. at 352. . . ."

In *Payne*, supra, the Sixth Circuit decided that the *Holiday* doctrine was applicable to the new statutory scheme and stated that there was no authority for a Special Master to conduct an evidentiary hearing and that the *court*, rather than a commissioner or special master, should "hear and determine the facts and dispose of the matter as law and justice require."

In the instant case, the oral testimony of the petitioner and the other witness at the evidentiary hearing was weighed and appraised by the district judge himself through his de novo consideration of the sound recording of the testimony. For this reason, we submit that this case substantially meets the standards set out by this

Court in *Holiday,* supra, and the Sixth Circuit in *Payne,* supra.

The 1968 *Federal Magistrates Act* was passed in order to upgrade the then existing United States' commissioner system. In *TPO, Incorporated* v. *McMillen,* supra, there is an excellent discussion of the legislative history of the magistrates act.

As a result of the passage of the Federal Magistrates Act, the title of the office was changed from United States Commissioner to United States Magistrate. All magistrates were required to be attorneys unless it was impossible to find a qualified attorney. Magistrates were paid fixed salaries rather than on a fee system. Full time magistrates were given secure eight-year terms, subject to removal only for cause. See *TPO, Incorporated,* supra, at page 351.

Argument has been made that magistrates cannot hold evidentiary hearings because they do not fall within Article III of the Federal Constitution which vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and that due process of law encompasses the right of litigants to have cases or controversies determined by Article III judges. See *TPO, Incorporated,* supra, at page 353.

Petitioner concedes that magistrates do not have authority *to decide or to make ultimate determination of fact, cases or controversies.* This must be left to the Article III courts, such as Federal District Courts.

However, petitioner submits that the purposely broad

language that Congress set out in the *Federal Magistrates Act* authorizes the federal courts to establish rules assigning duties to the magistrate to conduct evidentiary hearings and to submit *proposed* findings of fact and conclusions of law and his recommendation thereon. In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it de novo consideration as the habeas corpus petitioner, in this case, requested.

The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate.

For the foregoing reasons, respondent submits that the *Federal Magistrates Act,* 28 U.S.C. § 631, et seq., empowers a United States Magistrate to hold evidentiary hearings involving relief under 28 U.S.C. § 2241, et seq.

CONCLUSION

The Sixth Circuit has held that Magistrates cannot conduct evidentiary hearings on federal habeas corpus petitions. The First, Secord, and Fifth Circuits, by practice, have held that Magistrates can conduct such hearings.

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit to settle this conflict between the Circuit Courts in order that there might be uniformity of practice and deci-

sion in the Federal Courts as to whether a Magistrate is empowered to conduct evidentiary hearings on habeas corpus petitions by the Federal Magistrates Act, 28 U.S.C. § 631, et seq.

Respectfully submitted,

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ATTORNEY GENERAL

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Ed W. Hancock, one of counsel for petitioner, hereby certify that the foregoing Petition was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on November 23rd, addressed to counsel for respondent, Honorable Joseph G. Glass, 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202.

ED W. HANCOCK
ATTORNEY GENERAL

Commonwealth of Kentucky
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Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER.

APPENDIX

APPENDIX A

No. 72-2160

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING, ... Petitioner-Appellant,

V.

JOHN W. WINGO, ... Respondent-Appellee.

APPEAL from United States District Court
for the Western District of Kentucky.

Decided and Filed August 31, 1973.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Circuit Judge. Wedding appeals from the denial by the District Court of his petition for a writ of habeas corpus after an evidentiary hearing conducted by a United States Magistrate. Wedding is presently serving a life sentence imposed in 1949 by the Webster Circuit Court of Kentuckyafter a plea of guilty to a

charge of murder. He had filed his petition for the writ in the District Court in 1971, alleging among other things that his counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

Wedding's petieion was denied without a hearing. He appealed to this Court and we reversed and remanded with instructions to conduct an evidentiary hearing on the petitioner's claims of constitutional violation 456 F.2d 245 (6th Cir. 1972).

Upon remand, a United States Magistrate, acting pursuant to a rule adopted by the District Court, issued an order assigning the evidentiary hearing to himself. Prior to this hearing, however, the petitioner moved to disqualify the Magistrate from holding such hearing on the ground that a Magistrate was not authorized and empowered under authority of the Federal Magistrates Act of 1968 (28 U.S.C. §§ 631 to 639 (1973 supp.)) to hold evidentiary hearings. That motion was overruled by the District Court.

The evidentiary hearing was then conducted by Magistrate on June 26, 1972, at which time an electronic recording was made of the testimony of the witnesses. Thereafter the Magistrate adopted findings of fact and conclusions of law, in writing, ruling that no constitution right of petitioner had been violated, and recommending that the petition be dismissed. The Magistrate submitted to the Court his findings and conclu-

sions, together with a recording (a plastic phonograph record) of the proceedings.

The petitioner moved to have the Court give the matter de novo consideration. The Court listened to the recording and adopted the findings of fact and conclusions of law of the Magistrate as his own, and dismissed the petition as without merit.

The petitioner has again appealed to this Court, contending that the proceedings of the District Court were invalid because the United States Magistrate had no authority under the Act to conduct an evidentiary hearing on his habeas corpus petition. We agree.

The Federal Magistrates Act of 1968, 28 U.S.C. §§ 631 to 639 (1973 Supp.) provides in relevant part:

> "...
>
> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to —
>
> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." (28 U.S.C. §636 (1973 Supp.))

Pursuant to this statute, the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c)(3) the following:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party,

filed within ten days from the date such is so transmitted to the District Judge having purisdiction thereof, the District Judge shall proceed to hear the recording of the testimony, to the propr Disdentiary hearing and give it de novo consideration."

The interpretation by the rule which the Western District of Kentucky has placed upon the congressional grant of power to United States Magistrates is, in our opinion, incorrect.[1] The Act granted authority to the Magistrate to conduct only a preliminary review of applications for post-trial relief in order to facilitate the decision of the District Court as to whether there should be a hearing. This Court, in its mandate, had already directed that an evidentiary hearing be conducted. This rule of the District Court, quoted above. attempts to expand the jurisdiction of the Magistrate and, as will be pointed out, conflicts with the Act, and is therefore invalid.

Our analysis begins with *Holiday* v. *Johnston*, 313 U.S. 342 (1941), wherein the Court assessed the respondent's claim that a United States Commissioner (the predecessor of the United States Magistrate) could conduct evidentiary hearings for habeas corpus by

1. Because the Magistrates Act of 1968 cannot be interpreted to permit the procedure adopted by the Western District of Kentucky, we need not decide whether it would be permissible constitutionally for Congress to invest power to hold habeas corpus hearings in an official who is outside the pale of Article III of the Constitution. See, however, *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 352-354 (7th Cir. 1972).

virtue of Rule 53(a) and (b) of the Rules of Civil Procedure.

The Court stated:

"It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal compliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district courts in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53(a)(b) of the Rules of Civil Procedure.

"We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the de-

termination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." (313 U.S. at 351-352).

By virtue of *Holiday*, the conduct of habeas corpus hearings by United States Commissioners became a dead issue.

Subsequently, however, Congress modified the habeas corpus statute so to provide that "[t]he *court* shall summarily hear and determine the facts, and dispose of the matter as law and justice require", rather than "[t]he *court*, or *justice* or *judge*, shall proceed in a summary way to determine the facts of the case. . ." as was formerly provided. 28 U.S.C. § 2243 (1971). (Emphasis added.) The same judicial district involved in this case, the Western District of Kentucky, interpreted this modification of the habeas corpus statute as a new authorization by Congress to have officers other than United States Judges, hold habeas corpus evidentiary hearings.

In *Payne* v. *Wingo*, 442 F.2d 1192 (6th Cir. 1971), we squarely rejected this interpretation. We stated therein:

"When Congress retained the reference to the 'court' in the new statute, it must have meant to

retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of *Holiday* by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

. . .

"We realize that our decision in this case does not help alleviate the tremendous and increasing burden which the expanding number of habeas corpus petitions places on United States District Judges. Nevertheless, we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a clear mandate from Congress, we cannot presume, that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary." (Footnotes omitted) (422 F.2d at 1194-1195).

It is within this context that the interpretation placed upon 28 U.S.C. § 636(b) (1973 Supp.) by the Western District of Kentucky must be analyzed.

The respondent implicitly concedes that authorization for Magistrates to hold evidentiary hearings on habeas corpus petitions is not found in subpart (3) of 28 U.S.C. § 363(b) (1973 Supp.) That section clearly limits the duties of a Magistrate to a review of habeas corpus applications "to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" (Emphasis added.) 28 U.S.C. § 636 (b)(3) (1973 Supp.) Respondent's construction

actually conflicts with the plain language of this subsection.

However, respondent relies upon language immediately preceding subpart (3) of Section 636(b) for authorization of evidentiary hearings by Magistrates. In introducing the explicitly granted powers of United States Magistrates, Congress stated:

> "The additional duties authorized by rule [of a judicial district] include, *but are not limited to* — . . . ." (Emphasis added) 28 U.S.C. § 636(b) (1973 Supp.).

From this language respondent deduces that Congress invested in extra-judicial officials trial powers which it had for so many years withheld. The inaccuracy of this deduction is manifest.

If Congress intended such a sweeping and far-reaching result certainly it would have indicated this clearly and positively within the body of the Magistrates Act of 1968. *Cf., Buckeye Power, Inc.* v. *Environmental Protection Agency,* ____ F.2d ____ (6th Cir. No. 72-1628, June 28, 1973) Slip Opinion at 9.

More important, such an interpretation runs directly counter to the well-established doctrine of statutory construction denominated *ejusdem generis.* This doctrine directs that a general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope. The Supreme Court in *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U.S. 222. 228-229 (1957), articulated the rule as follows:

"[T]he law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.' *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107."

Therefore, although the Magistrates Act of 1968 provides that Magistrates are [not restricted to] the three powers explicitly outlined in the Act, by virtue of *ejusdem generis* those three powers are exclusive on the topics which they cover. Accordingly, insofar as habeas corpus is concerned, Magistrates have only the power to assist the District Judge in determining "whether there should be a hearing." 28 U.S.C. § 636(b)(3) (1973 Supp.).

The legislative history of Section 636(b) of 28 U.S.C. supports this proposition. The original draft of the subsection in the Senate Bill provided that the Magistrate could give:

". . .

(3) preliminary consideration of application for post-trial relief made by individuals convicted of criminal offenses."

The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):

"The Committee is of the opinion that the enumeration of duties in Section 636(b) as now

worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack . . ." (Hearings on S.3475 before the Subcommittee on the Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241n.)

In order to foreclose a broad interpretation of Section 636 (b)(3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, "preliminary consideration of applications for post-trial relief" in the Bill was narrowed to "preliminary review" of the applications and the power and authority of the Magistrate was restricted to "submission of a report and recommendations to facilitate the decision of the district judge" only as to "whether there should be a hearing." It was in this amended and narrowed form that the Act was passed by Congress.

Contemplating the possibility that this Court might reject its argument that a Magistrate has the power to conduct evidentiary hearings for habeas corpus, the respondent advances a second, alternative argument in support of the proceedings below. In its brief, respondent states:

"In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it de novo consideration as the petitioner, in this case, requested.

"The Federal Judge in this case made an independent determination and accepted the pro-

> posed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate."

To the extent that the respondent argues that the petitioner was given an evidentiary hearing "before a district judge" because he (the Judge) thereafter listened to a sound recording of the hearing before the Magistrate, we are not persuaded.[2] With equal propriety it could be argued that any civil case could be heard by a Magistrate and the Judge could later decide the case by listening to the sound recording. The Magistrate would indeed become as Assistant Judge.

Rule 52(a) of the Federal Rule of Civil Procedure provides that a District Judge, sitting without a jury, is to make findings of fact and that these findings are not to be set aside by an appellate court unless they are clearly erroneous. The principle which underlies this rule was expressed by the Supreme Court in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949), as follows:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who *see* and hear them." (Emphasis added).

Deference is given to the factual findings of a trial

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2. It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

judge because he has seen and observed the *demeanor* of the witnesses, and their "[o]utward manner or comportment." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1956). Listening to a sound recording of the testimony of a witness does not permit a Judge to see and observe the demeanor of witnesses and make credibility determinations therefrom.

Furthermore, it must be noted that an essential ingredient of a hearing before a Judge without a jury is the opportunity afforded to the Judge for questioning of witnesses. By his questioning of witnesses the Judge can clarify matters of evidence which are unclear; he can rule on objections made by the parties; and in the interest of justice he can make sure that both parties have had a fair hearing. By seeing and hearing the witnesses he will be in a much better position to make credibility determinations. Needless to say, the District Judge in this case could not ask questions of the sound recording. In our opinion, Wedding had the right to have his case heard by an Article III Judge.

In sum, petitioner did not have a hearing before a District Judge, either in form or in substance, as we ordered in our mandate.

In regard to the entire posture of this case, a recent admonition of the Court should be borne in mind. In *Ingram* v. *Richardson*, 471 F.2d 1268 (6th Cir. 1972), we stated:

> "Crowded court calendars may be a problem in the United States District Court for Eastern District of Kentucky. Reference of cases to Magis-

> trates, however, is not the proper solution of the problem. . . . [T]he problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review *by a court.*" (Emphasis added). (471 F.2d at 1281).

We vacate the judgment of dismissal and remand the case with instructions that the Court itself hold an evidentiary hearing on petitioner's constitutional claims.[3]

In so doing, we are impelled to note that the phonographic record of the evidentiary hearing was made a part of the record to this Court, apparently in lieu of a transcript. Such procedure was unauthorized. It renders impossible a review by this Court of the record without listening to the sound recording, and it contravenes Rule 10 of the Federal Rules of Appellate Procedure and Rule 10 of this Court.

Vacated and remanded.

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3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. *Gonzales* v. *Zlker*, —— F.2d —— (2d Cir. No. 72-1945, Apr. 17, 1973); *Johnson* v. *Wainwright*, 456 F.2d 1200 (5th Cir. 1972); *Parnell* v. *Wainwright*, 464 F.2d 735 (5th Cir. 1972); *United States* v. *King*, 455 F.2d 345 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no question as to the legality of reference was raised or passed upon by the Courts.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-846

JOHN W. WINGO, WARDEN
KENTUCKY STATE PENITENTIARY
EDDYVILLE, KENTUCKY ..... PETITIONER

vs.

CARL JAMES WEDDING ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit (App. 61) is reported as *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on August 31,

1973 (App. 61). The petition for writ of certiorari was filed on November 23, 1973, and was granted on January 21, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Magistrates Act, 28 U.S.C. § 631, et seq., empowers a United States Magistrate to hold evidentiary hearings involving relief under 28 U.S.C. § 2241, et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is Article III of the United States Constitution which vests the judicial power of the United States.

The statutes involved here are 28 U.S.C. § 2241, et seq., the statutory codification of Federal Habeas Corpus; and 28 U.S.C. § 631, et seq., the Federal Magistrates Act, and particularly 28 U.S.C. § 636 (b).

STATEMENT OF THE CASE

Respondent, Carl James Wedding, hereafter "Mr. Wedding", is currently serving a life sentence imposed in 1949 by the Webster Circuit Court, Commonwealth of Kentucky, after entry of a plea of guilty to murder.

Pursuant to Rule 11.42, Kentucky Rules of Criminal Procedure, Mr. Wedding, in 1970, filed a motion to vacate this sentence in the Webster Circuit Court

which was denied without a hearing. That order was affirmed by the Kentucky Court of Appeals, *Wedding* v. *Commonwealth*, Ky., 468 S.W.2d 273 (1971).

Thereafter, Mr. Wedding, pro se, filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to provisions contained in 28 U.S.C. § 2241, et seq. The District Court entered an order dismissing the petition. Mr. Wedding appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the lower court and remanded the matter to the District Court stating that "the petition for habeas corpus presents issues of fact requiring an evidentiary hearing" (App 11).

Pursuant to Rule 16(c)(3), Rules of the United States District Court for the Western District of Kentucky, the District Court assigned the matter of the evidentiary hearing to the full-time magistrate and appointed the Honorable Joseph G. Glass to represent Mr. Wedding (App. 13). Prior to the holding of the evidentiary hearing, Mr. Wedding moved to disqualify the magistrate from holding such hearing on the grounds that the magistrate was not empowered to hold evidentiary hearings under authority of the Federal Magistrates Act, 28 U.S.C. § 631, et seq. That motion was overruled by the District Court (App. 15, 28).

An evidentiary hearing was held on June 26, 1972, before the magistrate, sitting specially at Dixon, Web-

ster County, Kentucky (App. 34). Thereafter, the magistrate provided the District Court with his Findings of Fact and Conclusions of Law and his Report and Recommendation which recommended to the District Court that Mr. Wedding's petition be dismissed (App. 40, 41).

Mr. Wedding, pursuant to Rule 16(c)(3), Rules of the United States District Court for the Western District of Kentucky, requested that the District Court consider the matter de novo (App. 50).

The District Court, after considering all the pleadings in the case and having read the magistrate's Findings of Fact and Conclusions of Law and his Report and Recommendation thereon and having heard the recorded testimony of the evidentiary hearing and giving it de novo consideration, adopted the magistrate's Findings of Fact and Conclusions of Law as his own and entered an order dismissing Mr. Wedding's petition for writ of habeas corpus (App. 59).

Mr. Wedding appealed the District Court's order to the Sixth Circuit. The Sixth Circuit once again reversed the decision of the District Court by vacating the judgment of dismissal and remanded the case with instructions that the District Court itself hold an evidentiary hearing on Mr. Wedding's constitutional claims, *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir 1973) [App. 61]. It is from this order that a review is sought.

ARGUMENT

THE FEDERAL MAGISTRATES ACT, 28 U.S.C. § 631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. § 2241, ET SEQ.

Magistrates are empowered to conduct evidentiary hearings on habeas corpus petitions by Section 636(b) of the Federal Magistrates Act. This section, 28 U.S.C. § 636(b), provides:

> "*Any district court of the United States by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate* or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, *may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.* The additional duties authorized by rule *may* include, *but are not restricted to* —
>
> "(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> "(3) ***preliminary review*** of applications for posttrial relief made by individuals convicted of criminal offenses, ***and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over***

the case as to whether there should be a hearing." (Emphasis added.)

Thus, Section 636(b) authorizes the district court to establish rules from which the magistrates may be assigned additional duties as long as these duties are not inconsistent with the Constitution and the laws of the United States.

Section 636(b)(3) clearly gives magistrates the power to conduct a preliminary review of habeas corpus applications and to submit a report and recommendation as to whether there should be a hearing. See *Noorlander* v. *Ciccone*, ____F.2d____ (8th Cir. filed December 27, 1973), which was decided subsequent to the filing of the petition for certiorari in the instant case.

It is further submitted that the three additional duties which Congress set forth in 28 U.S.C. § 636(b), subsections (1), (2), and (3), were suggested duties, not required duties. For this reason, these suggested additional duties cannot be reasonably interpreted to be "exclusive on the topics which they cover" as the Sixth Circuit held them to be under the theory of ejusdem generis. *Wedding* v. *Wingo*, 483 F.2d 1131 at 1135 (6th Cir. 1973). A sectional analysis of the Federal Magistrates Act in H.R. Rep. No. 1629, 90th Cong., 2d Sess. (1969), as quoted in U.S. CODE CONG. & AD. NEWS at 4262 (1969), states:

"Proposed 28 U.S.C. 636(b) mentions three categories of functions assignable to magistrates under its provisions. *The mention of these three categories is intended to illustrate the general char-*

acter of duties assignable to magistrates under the act, *rather than to constitute an exclusive specification of duties so assignable.*" (Emphasis added.)

In view of this broad and not restrictive listing of additional powers and duties under § 636(b), it is readily apparent from a review of the hearings of the Subcommittee On Improvements in Judicial Machinery, that the magistrates would be empowered to conduct preliminary hearings in posttrial relief cases made by individuals convicted of criminal offenses. Such intent is evidenced in the following statements of Senator Joseph D. Tydings, chairman of the subcommittee:

"Senator TYDINGS. You don't think that the judge, particularly in one of the tremendously burdened courts, has time to read and laboriously go through every handwritten page of these postconviction petitions?

Mr. VINSON. I would suggest that he have someone translate and decipher for him

Senator TYDINGS. He has got to have someone boil down the petition and prepare a memorandum for him on the facts and law involved. It is a physical impossibility for the judges, not only at the district court level, but at the circuit court of appeals level, to do everything — from deciphering the petition to the decision.

Mr. VINSON. But that is a function that I understand is now performed generally by law clerks where the judge is involved on these hearings under 2255.

Senator TYDINGS. In some places the judges have to do it themselves, too, if they don't have law clerks that have been with them long enough to de-

velop an expertise so that the judges have sufficient confidence in them.

Mr. VINSON. I assume that the committee would not intend that the 2255 hearing actually be held by a magistrate.

"Senator TYDINGS. We wouldn't intend for the final decision to be made by the magistrate. But we would intend that if the magistrate could hold a preliminary hearing, so to speak, or could review the documents and give a memorandum to the judge so that the judge could make the final decision based on the nature of discovery proceeding or review of petition by the magistrate. We certainly intend that. We intend this to lift off the shoulder of the judges as much of the routine nature of discovery or fact-finding operation connected with post-conviction procedure and petitions as possible.

Mr. VINSON. So that there can be no confusion, we have no quarrel with whether the clerical work, the deciphering work, the summarizing work, is done by a law clerk or by a magistrate.

Senator TYDINGS. And the discovery part of it, that is, the determination of whether or not there was any foundation for the allegations by the individual petitioner that the district court was bribed, the U.S. attorney was bribed. I don't know how much experience you have had with some of these petitions, but I can assure you that they are pretty outlandish at times. And much of it requires steady work and digging in to determine what the facts are. Of course, the judge has to make the final decision. But insofar as the petition requires work in the nature of digging in for the facts and, if necessary, holding plenary hearings, and calling in the petitioner him-

self and taking testimony from him, we feel that this is an area which the magistrate can well handle.

Mr. VINSON. I would beg to differ in that I would think the magistrate would not have the power to hold the hearing.

Senator TYDINGS. For purposes of discovery?

Mr. VINSON. I argued the case in the Supreme Court of *United States* v. *Sanders*, which is the guideline decision on the right of a defendant to a hearing by a judge on a 2255 application. And I feel that the only argument you could make that would allow a magistrate rather than an article III judge to hold that hearing would be that it is a civil proceeding.

Senator TYDINGS. Well, it is a civil proceeding.

Mr. VINSON. It is labeled as such. However, 2255 is, of course, the Federal habeas corpus proceeding.

That is the great writ.

Senator TYDINGS. You don't dispute that it is a civil proceeding, do you?

Mr. VINSON. It is labeled civil. It is on the civil docket of the district court.

Senator TYDINGS. Do you or don't you dispute that it is a civil proceeding?

Mr. VINSON. I think it is a mixture, Mr. Chairman.

Senator TYDINGS. Then you say it is not a civil proceeding?

Mr. VINSON. I think it is a mixture. It is labeled as civil, but it has definite criminal overtones.

It involves whether a man should be released from incarceration for a crime.

Senator TYDINGS. A what point would you prohibit the magistrate from acting in a post-conviction procedure case?

Mr. VINSON. I don't believe that the magistrate could hold the hearing and make findings of fact in this matter.

Senator TYDINGS. What about the review of the decision itself and the wirting (sic) of memorandum for the judge as to the validity of it? Don't law clerks do that?

Mr. VINSON. I think the judge could have anyone that he wished do that, Mr. Chairman.

"Senator TYDINGS. Do you think that it would be all right for the magistrate to review the facts of the petition and make a recommendation to the judge that he felt it was without validity? But as I understand your testimony, you say the magistrate couldn't hold a hearing and have people come in and testify and then say that he felt that on the basis of the hearing the statements made by the petition would not hold water or were not factual?

What is the difference?

Mr. VINSON. I think that is the exercise of judicial power.

Senator TYDINGS. Are you familiar with the case of *Crowell* v. *Benson*. 258 U.S. 22?

Mr. VINSON. Generally, yes.

Senator TYDINGS. Do you recall that there the Supreme Court said that, in order to maintain the essential attributes of judicial power, all determina-

tions of fact in a constitutional court need not be made by judges?

Mr. VINSON. Yes. But I also believe that the Court said that he had a de novo right of review in the district court in such case.

Senator TYDINGS. We don't propose here — we say that the judge has to make the final decision. We say that the magistrate should be able to assist him to the point of holding plenary, discovery hearings. Now, what happens now as a practical matter, you get no hearings. The law clerk reviews the papers. If he is a good law clerk, fine, he make a recommendation. And generally the judge takes it. So we are giving the individual prisoner actually an opportunity — or petitioner — for more consideration than he gets now. And yet you say that you don't think magistrates should be able to hold the hearing. They could do everything except have a hearing, even to the point of recommending it to the judge.

Mr. VINSON. Mr. Chairman, I am not directing my comments at the desirability of this. But I think it would be desirable to devise some way to relieve the U.S. district court judges of what has become and is becoming an increasing burden, the post-conviction motions for relief.

I think you would equate it with the reference to a master or to an auditor in a civil matter.

Senator TYDINGS. I still think that section 2255 is a civil proceeding as Congress has labeled it. But you obviously disagree..

Mr. VINSON. I think it is a mixture, Mr. Chairman.

* * *

Hearings on S. 3475 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (July 12, 1966) [Senate Hearings, 112-114]

Moreover, allowing the magistrate to conduct an evidentiary hearing on a habeas corpus petition is not inconsistent with the Constitution or statutes of the United States.

In this regard, argument has been made that magistrates cannot hold evidentiary hearings because they do not fall within Article III of the Federal Constitution which vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and that due process of law encompasses the right of litigants to have cases or controversies determined by Article III judges. See *TPO, Incorporated* v. *McMillen*, 460 F.2d 348 at page 353 (7th Cir. 1972).

It is conceded that magistrates do not have authority *to decide or to make ultimate determination of fact, cases or controversies.* This must be left to the Article III courts, such as Federal District Courts.

However, we submit that the purposely broad language that Congress set out in the Federal Magistrates Act authorizes the federal courts to establish rules assigning duties to the magistrate to conduct evidentiary hearings and to submit *proposed* findings of fact and conclusions of law and his recommendation thereon. In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the

Federal Judge to hear the testimony and give it de novo consideration as the petitioner, in this case, requested.

The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate.

In addition, the Eighth Circuit in *Noorlander* v. *Ciccone*, supra, in discussing § 636(b) stated:

> ". . . To summarize, we do not believe the statute prohibits magistrates from holding hearings in habeas corpus matters if a full opportunity is given for a de novo hearing before an Article III judge in the event that dispute as to a material issue of fact develops during the course of a hearing and if the final decision-making power is retained in the court.
>
> "We are convinced that no constitutional provisions are violated by permitting magistrates to conduct preliminary evidentiary hearings in habeas corpus matters provided, of course, that the judge retains and *exercises* the decision-making power with respect to the law and the facts. Rule 26 reserves these powers to the court, with the exceptions hereinafter noted. The rule provides the court with a convenient, quick and efficient method of sorting out the legal and factual issues. It goes further than some rules in giving the magistrate the right to conduct evidentiary hearings, but the hearings are essentially preliminary in nature and designed to assist the trial court in reaching an early and proper result. The rule does not confer the judicial power of the United States to decide cases on someone other than an Article III judge.

"Nor does the rule, with the exceptions hereinafter noted, violate the due process right of a litigant to have his case heard by an Article III judge. A petioner is always entitled to take exceptions to material issues of fact and conclusions of law. If he takes exception to the former, an Article III judge "will personally take the testimony of the witnesses, determine their credibility and decide for himself what the facts are. If the exceptions are only as to conclusions to be drawn from undisputed material facts, the judge will again decide for himself what the proper procedure is. As we see the rule, it takes one short but important step beyond those already taken by most courts. It permits a magistrate to go beyond the pleadings and records, and to conduct an evidentiary hearing to determine whether there are in fact disputed material issues of fact. If there are some, he can point them out and make *preliminary* findings. If there are none, he can so find. It seems to us that this procedure, if carefully followed, can help the petitioners achieve a prompt and a fair determination of the rights by an Article III judge." [Emphasis in the original]

Thus, none of the habeas corpus applicant's constitutional rights are violated by the magistrate conducting an evidentiary hearing so long as the ultimate determination is made by the Article III judge and the opportunity exists for de novo consideration as was the situation in the case at bar.

The Sixth Circuit in this case held that magistrates could not conduct evidentiary hearings on habeas corpus applications. In support of its position, the Sixth Circuit relied upon *Holiday* v. *Johnston,* 313 U.S. 342, 85 L.ed 1392, 61 S.Ct. 1015 (1941). In *Holiday,* this Honorable Court held that a United States Commissioner was with-

out authority to hold evidentiary hearings on habeas corpus petitions. However, *Holiday* was decided before enactment of the 1968 Federal Magistrates Act. The Eighth Circuit stated in *Norrlander*, supra, as follows:

> "Finally, we do not read *Holiday* v. *Johnston*, 313 U.S. 342 (1941), as holding the Constitution prohibits magistrates from conducting evidentiary hearings in all habeas corpus matters. We rather read that case as indicating that the statute being construed by the Court at that time did not permit commissioners to conduct evidentiary hearings in habeas corpus matters. **We deal with a different statute here.**"

In noting the difference between the proposed Federal Magistrates Act and the existing United States Commissioner statute, Senator Tydings, from the floor of the Senate, stated:

> "The bill reflects the virtually unanimous conclusion of these witnesses that the present U.S. commissioner system is inadequate to meet the demands of a modern system of justice, and that drastic reforms are needed promptly."
>
> * * *
>
> ". . . At an early stage it became evident that we must choose one of two routes: first, to downgrade the system and relegate the commissioners to the performance of ministerial functions, transferring to the district judges the bulk of the duties now performed by commissioners; or second, to upgrade the commissioner in stature, qualifications, and compensation, making him equal to the important judicial tasks that he currently must perform, and giv-

ing him important new functions in the administration of criminal justice."

* * *

"The bill, therefore, is predicated on the fundamental assumption that the commissioner system should be upgraded, making it capable of discharging effectively the duties we presently call upon it to perform, and of undertaking new functions to relieve the district judges of some of their burden."

113 Cong Rec. 3242, 3243 (1967).

As a result of the passage of the Federal Magistrates Act, the title of the office was changed from United States Commissioner to United States Magistrate. All magistrates were required to be attorneys unless it was impossible to find a qualified attorney. Magistrates were paid fixed salaries rather than on a fee system. Full time magistrates were given secure eight-year terms, subject to removal only for cause. See discussion of legislative history in *TPO, Incorporated,* supra, at page 351.

We, therefore, submit that *Holiday* is not controlling over the provisions under the Federal Magistrates Act nor the instant case.

CONCLUSION

For the foregoing reasons, the Federal Magistrates Act empowers magistrates to conduct evidentiary hearings and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on March 5th, 1974, addressed to counsel for respondent, Honorable Joseph G. Glass, 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-846

JOHN W. WINGO, Warden
Kentucky State Penitentiary, Eddyville, Kentucky

Petitioner,

v.

CARL JAMES WEDDING

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion below from the United States Court of Appeals for the Sixth Circuit is reported as *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir., 1973), and is correctly set forth in the Appendix beginning at page 61.

JURISDICTION

The jurisdiction for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was properly invoked by the petitioner under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE FEDERAL MAGISTRATES ACT, 28 U.S.C. §631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. §2241 ET SEQ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner correctly stated the Constitutional and Statutory provisions involved, and are to be found on page 2 of petitioner's brief.

STATEMENT OF THE CASE

The respondent accepts, as being substantially correct, the petitioner's Statement of the Case, which is found at pages 2-4 of petitioner's brief.

ARGUMENT

I.

WHETHER THE FEDERAL MAGISTRATE'S ACT, 28 U.S.C. §631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. §2241 ET SEQ.

The Federal Magistrate's Act, (hereinafter referred to as the Act) 28 U.S.C. §631, et seq., created the position of United States Magistrate (hereinafter referred to as Magistrate) by appointment of the Court, in the various judicial districts. The jurisdiction and powers of the Magistrate are established in 28 U.S.C. §636, and are set forth, in pertinent part, as follows:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment–
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time

magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to–

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as whether there should be a hearing.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof

as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath of affirmation as a witness, or having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court, would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

With regard to the Act itself, the respondent calls the Court's attention to three (3) particular subsections of 28 U.S.C. §636. Those being:

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment–

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; . . .

(2) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of this section.

(b) . . . The additional duties authorized by rule man include, but are not restricted to–

(3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* (Emphasis added).

In *Holiday v. Johnston*, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), this Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions. In its opinion this Court reasoned, at page 352, that:

> One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. *We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.* (Emphasis added).

This Court then went on to hold, at pages 353-354, that:

> The District Judge should *himself* have heard the prisoner's testimony and, in light of it and other

> testimony, *himself* have found the facts and based his disposition of the cause upon *his* findings. (Emphasis added).

In 1971, the United States Court of Appeals for the Sixth Circuit, utilizing the above language from *Holiday v. Johnston, supra,* reversed a matter where a Special Master (actually a duly appointed United States Commissioner) had been appointed to hold an evidentiary hearing on a federal habeas corpus petition. *Payne v. Wingo,* 422 F.2d 1192 (1971). This case was later followed by *Green v. United States,* 445 F.2d 847 (6th Cir., 1971).

In *Payne v. Wingo, supra,* at page 1194, the Court went on to discuss that the Federal Rules of Civil Procedure "provide no authority for the delegation of the conduct of habeas corpus evidentiary hearing to a Special Master." Moreover, the Court considered the tremendous case load of the district courts, and on that point stated, at page 1194:

> . . . Nevertheless we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a *clear* mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary. (Emphasis added).

It is noteworthy to observe that *Holiday v. Johnston, supra,* was decided on the basis of 28 U.S.C. §457, 458 and 461, and principally upon §461. Those sections were incorporated within 28 U.S.C. §2243 enacted June 25, 1948. (*Holiday v. Johnston, supra,* and Reviser's note: 28 U.S.C.A. §2243).

Further, in *Payne v. Wingo, supra,* the Court discussed 28 U.S.C. §461 and its successor 28 U.S.C. §2243 with

regard to the terms "the court, or justice, or judge." At page 1194, the Court stated:

> . . . Although the statute interpreted in Holiday authorized 'the court, or justice or judge' to determine the facts, and the current provision merely refers to 'the court', we do not find the difference significant. The Supreme Court in Holiday essentially held that the phrase 'court, justice, or judge' in 28 U.S.C. §461 referred to a federal judge rather than a commissioner. Since these words were phrased in the alternative in that statute, the Supreme Court in Holiday found that the word 'court' was the equivalent of the word 'judge' for purposes of 28 U.S.C. §461. When Congress retained the reference to the 'court' in the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of Holiday by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

18 U.S.C. §3401, discussed in the jurisdiction and powers section of the Act (§636) does not discuss civil proceedings in any form.

Remaining, then, is subsection (b)(3) of the Act which discusses additional duties of the Magistrate. Respondent urges that the language of that subsection is clear and concise and should be interpreted literally, that is,

> . . . The additional duties authorized by rules may include. . .
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate*

> *the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* (Emphasis added).

The legislative history of the Act is somewhat instructive on the issue in question, in that it does not mention any provision for allowing Magistrates the authority for holding evidentiary hearings on habeas corpus hearings. In point of fact, under the provision *Purpose of Legislation*, U.S. Code Congressional and Administrative News, Vol. 3, 1968, p. 4254, it is stated that:

> In summary, §945 is intended both to update and make more effective a system that has not been altered basically for over a century, and to cull from the evergrowing workload of the U.S. district courts matters that are desirably performed by a *lower tier* of judicial officers. (Emphasis added).

Unquestionably, at the legislative hearings on the Act, there were discussions about the Magistrates holding evidentiary hearings, some of which the petitioner has incorporated in his brief, pp. 7-12. However, in light of these discussions, the legislation was enacted without any authoritative provisions for the Magistrate holding such hearings.

The petitioner has cited *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir., 1973) in support of his argument that Magistrates are empowered to conduct evidentiary hearings in habeas corpus matters. The respondent believes that one paragraph of that opinion is particularly important for consideration. In *Noorlander, supra*, at p. 647, the Court states:

> In summary, it is apparent that the holding of hearings, at least in postconviction cases, *was at first considered by Congress to be one of the duties*

properly assignable to magistrates. In the face of opposition, Congress left out any specific delegation of the power to hold hearings to the magistrates, and in effect skirted the issue by saying only that the magistrate could perform any function consistent with the Constitution and laws of the United States. (Emphasis added).

In light of the legislative hearings involving the particular subject of habeas corpus evidentiary hearings, and the fact that the Congress did not provide for or specifically empower the Magistrate to hold such hearings, the respondent urges the Congress, therefore, did not intend to provide this authority. Moreover, it seems clear that the Congress intended only to relieve the district judges of the more routine or mundane chores which were and are imposing an increasing burden upon the time and duties of the district judge. As stated in the section, *The Need For The Legislation,* U.S. Code Congressional and Administrative News, Vol. 3, 1968, p. 4257:

> Although the present U.S. commissioner system is in many ways defective, it is neither practical nor desirable simply to abolish the commissioner system and transfer the functions now performed by that office to the U.S. district court judges, who are already overburdened by their present duties and not geographically situated to service the needs of remote areas of the country.
>
> An upgraded system of judicial officers below the level of the district judge can provide significant advantages for the Federal judicial system. By raising the standards of the lowest judicial office and by increasing the scope of the responsibilities that can be discharged by that office, the system will be made capable of increasing the overall efficiency of the Federal judiciary, while at the same time provid-

ing a higher standard of justice at the point where many individuals first come into contact with the courts.

The Act was not intended to make a district judge of the magistrate. Congress only intended to transfer the routine tasks of the district judge to a full-time administrative-judicial officer. Habeas Corpus evidentiary hearings are not routine tasks.

On this point the respondent believes it is important to note that the "Great Writ", as the Writ of Habeas Corpus has been described, is rooted deep in the common law and held to be "a precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnson,* 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455 (1939); *Darr v. Burford,* 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950). Its origins are deep in English history and "it was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors" *Ex Parte Yerger,* 8 Wall, (75 U.S.) 85, 95 L.Ed. 332.

Respondent cannot keep from observing that some underlying reasoning of the various courts favoring the expansion of Magistrates duties may well involve the fact that the workload of the district courts has dramatically increased through the years. This has been discussed in many articles. In 55 F.R.D. 119, *Has The Time Come?,* 1972, Mr. Chief Justice Burger recited that the district court filings have nearly doubled in the 41 years between 1931 and 1972; from 75,000 filings to 140,000 filings annually. Many, many of these filings are habeas corpus petitions, and they too increase annually, 33 F.R.D. 409, *Suggestions for Lessening the Burden of Frivolous Applications,* by Hon. Walter L. Pope, 1962. In *Noorlander v. Ciccone, supra,* at p. 644, the Court states:

> During the past several years an ever increasing number of prisoner petitions have been filed in federal court by and for inmates of the Springfield Medical Center. One result of this flood of litigation has been a substantial drain of judicial manpower of the Western District of Missouri. Another result has been a substantial delay in processing these cases. In order to provide for prompt disposition of these cases, this rule (Local rule 26) was adopted by the district court en banc and positive efforts have been made by the court, the magistrate, the Public Defenders and the Assistant United States Attorney to reduce this backlog.

It would seem that the better solution to the problem would be the appointment of more district judges. In industry, if the product demand increases, more qualified personnel are added to meet that demand. Qualified is the key word. In this analogy, the qualifications are established by Article 3 of the Constitution of the United States of America.

The respondent believes that another analogy can be accurately recited in support of his position. The Act provides that the Magistrate has "The power to conduct trials of *minor* criminal offenses. . . ." 28 U.S.C. §636(a)(3). Minor offenses have been defined as misdemeanors punishable by imprisonment not exceeding one (1) year, or by a fine not exceeding $1,000.00, or both. 18 U.S.C. §3401, as amended by §302. The great bulk of the postconviction relief claims are filed by persons who have received substantially greater sentences, as for example, the respondent who is serving a life sentence. It seems incongruous that a Magistrate could virtually decide major fact questions in habeas corpus petitions, involving years of a person's liberty, when he is not authorized to decide federal criminal cases involving

penalties exceeding one (1) year or a $1,000.00 fine, or both.

While it is true that the ultimate decision in 28 U.S.C. §2241 et seq. matters does rest with the district court, what assurance would there be, for example, that the district judge would not simply adopt, pro forma, the Findings of Fact and Conclusions of Law submitted by a Magistrate. At least one court has expressed this reservation. In *Rainha v. Cassidy*, 454 F.2d 207 (1st Cir., 1972) the Court, at pp. 207-208, states:

> The Court denied the stay without hearing the parties, relying on a magistrate's report of findings and recommendations based upon an evidentiary hearing before the magistrate. Petitioner appeals.
>
> We are troubled at the outset by this procedure. A magistrate has authority to do certain limited things, and to perform such further duties 'as are not inconsistent with the Constitution and laws of the United States,' as may be determined by the particular district court. 28 U.S.C. §636(b). As a statutory example, we quote subsection (3).
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.
>
> While the present case involves a habeas corpus proceeding of a different character, *the thought that the magistrate, rather than recommending a hearing after a perliminary review, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands by the district court without notice, does not appeal to us in the least.*

We do not pursue this matter in the present case because a close questioning of counsel by the single judge of this court to whom a hearing on the application for stay was referred, discloses that in fact petitioner admitted the correctness of certain of respondent's testimony which we regard as foreclosing any possibility of success of petitioner's part. (Emphasis added).

As the Court stated in the case at bar, *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir., 1973), at pp. 1135-1136:

> . . . The original draft of the subsection in the Senate Bill provided that the Magistrate could give:
>
> '. . .
>
> (3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses.'
>
> The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):
>
> 'The Committee is of the opinion that the enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack . . . .' (Hearings on S.3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241 n.)
>
> *In order to foreclose a broad interpretation of Section 636(b)(3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, 'preliminary consideration of applications for post-trial relief' in the Bill was*

narrowed to 'preliminary review' of the applications and the power and authority of the Magistrate was restricted to 'submission of a report and recommendations to facilitate the decision of the district judge' only as to 'whether there should be a hearing.' It was in this amended and narrowed form that the Act was passed by Congress. (Emphasis added).

Moreover, the Court further noted, at p. 1136, N. 2, that:

> It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

This court, in *Palmore v. United States*, 410 U.S. ___, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) states at p. 350, that:

> Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed it(s) wishes', *Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 212, 20 L.Ed.2d 1037, 88 S.Ct. 1970 (1968).

The respondent submits that if Congress had intended that Magistrates hold evidentiary hearings in habeas corpus matters, then certainly such a provision would have been incorporated within the Act. In light of the hearings and discussions on the Act, heretofore discussed, it is apparent that Congress determined to specifically exclude such hearings. 28 U.S.C. §636 is a jurisdictional statute, and in accordance with *Palmore, supra*, should be construed precisely as it was enacted. It should not be expanded through judicial construction.

Another point of significance is the fact that a Magistrate does not have to be an attorney. 28 U.S.C.

§631(g)(1). While the statute does call for the appointment of members of the bar in good standing within their respective jurisdictions, there is a provision for the appointment of a non-attorney if no qualified member of the bar is available for service. Evidentiary hearings are among the most difficult functions a judicial officer has to perform. Habeas corpus evidentiary hearings represent some of the most technical aspects of the law. It is difficult to consider how a non-lawyer would be able to function in this area.

The respondent urges that the applicable law on this question is still as recited in *Holiday v. Johnston, supra,* and that the enactment of the *Federal Magistrates Act* has not altered its meaning in any way. The District Judge, except in special circumstances involving direct habeas corpus applications to Circuit Judges and the Supreme Court Justices, is the person who has authority, by law, to hold evidentiary hearings on Petitions for Writ of Habeas Corpus. This position has been supported by the Sixth Circuit Court of Appeals in the instant cases, *Wedding v. Wingo, supra;* by the Seventh Circuit Court of Appeals in *TPO, Incorporated v. McMillen,* 460 F.2d 348 (1972); and by the First Circuit Court of Appeals in *Rainha v. Cassidy,* 454 F.2d 207 (1972).

CONCLUSION

The respondent believes that the Congress did not intend to provide the Federal Magistrates with the jurisdiction to conduct evidentiary hearings on habeas corpus matters. For this reason, the respondent submits that the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-846

JOHN W. WINGO, WARDEN KENTUCKY STATE PENITENTIARY EDDYVILLE, KENTUCKY,

Petitioner,

vs.

CARL JAMES WEDDING,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-846

JOHN W. WINGO, WARDEN KENTUCKY STATE PENITENTIARY EDDYVILLE, KENTUCKY,

Petitioner,

vs.

CARL JAMES WEDDING,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

In this habeas corpus case an evidentiary hearing was conducted by a United States Magistrate pursuant to a local district court rule purportedly adopted under the authority of the Federal Magistrates Act of 1968. This Court has undertaken to determine whether the conducting of the hearing by the magistrate was authorized by the Federal Magistrates Act and by the United States Constitution.

Federal habeas corpus statutes confer upon single district judges what amounts to the power to set aside

decisions of state trial courts which in many instances may have been affirmed in the intermediate and highest state appellate courts. In California the district judges have in a number of cases delegated the duty of conducting evidentiary hearings to United States Magistrates pursuant to local orders similar to the rules adopted by the district court in the instant case. In view of the extraordinary powers conferred upon the federal district courts in habeas corpus matters, the State of California has a special interest in ensuring that all relevant determinations of fact and law, including the findings which are the result of an evidentiary hearing, be made by the district judge who is responsible for making the ultimate decision in the case. This interest brings the State of California before this Honorable Court as *amicus curiae*.

Summary of Argument

Article III of the United States Constitution, which vests the judicial power of the United States in the Supreme Court and inferior courts established by Congress, contains the implicit requirement that judges who are charged with the exercise of the judicial function will themselves conduct all proceedings necessary for a proper determination of each case. The assignment to United States Magistrates of the duty to conduct evidentiary hearings in habeas corpus matters deprives the parties of the right to be heard before the ultimate trier of fact and therefore constitutes an improper delegation of the exercise of the judicial function in violation of the spirit of Article III.

The use of United States Magistrates to conduct evidentiary hearings in habeas corpus matters is also prohibited by the Federal Habeas Corpus Act which expressly requires that such hearings be conducted by the district judge. The Federal Magistrates Act effected no change in this requirement. Rather the express language and legislative history of the Act indicate the clear intent of the Congress that the role of magistrates in habeas corpus matters be limited to giving assistance to the district judges in the determination of whether an evidentiary hearing should be conducted.

ARGUMENT

Evidentiary Hearings on Habeas Corpus Petitions Are Required to Be Conducted Before Judges Who Have Been Duly Appointed Under Article III of the Constitution

A. The Constitution Requires That Evidentiary Hearings in Habeas Corpus Matters Be Conducted by the Judge Who Is Empowered Under Article III to Exercise the Judicial Powers of the United States

Federal district judges, who are empowered by Article III of the Constitution to exercise the judicial power of the United States, are not authorized under Article III to delegate their fact finding duties to United States Magistrates in habeas corpus matters.

This Court has long recognized the general right of parties to a law suit to have relevant issues of fact considered and determined by the ultimate finder of facts. In *La Buy v. Howes Leather Company,* 352 U.S. 249, 256 (1957), this Court held that an improper reference of a case to a special master in violation of Rule 53(b) of the Federal Rules of Civil Procedure "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." The decision in *La Buy, supra,* was based on the Court's interpretation of Rule 53 and did not specifically rely on the prescriptions of Article III. However, the Court's restrictive construction of Rule 53 as not permitting a reference to a master even in a case containing complicated issues and arising at a time when the court was faced with a congested calendar indicates, along with above-quoted language, this Court's

concern that parties to an action be heard before the judge who is charged with making the ultimate decision.

In habeas corpus matters, an evidentiary hearing need not be conducted where the application and return present only issues of law. 28 U.S.C. §2243. Thus in a case where an evidentiary hearing is ordered and conducted, the issues of fact to be determined are a vital and often conclusive part of the proceedings. *Payne v. Wingo*, 442 F. 2d 1193, 1194-95 (6th Cir. 1971).

This Court acknowledged in *Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941), that the weighing and appraising of testimony was an essential element in the determination of the crucial facts in a habeas corpus matter, and that an appraisal of the truth of a prisoner's oral testimony by a master or commissioner was not, in light of the purpose of the evidentiary hearing, the equivalent of the judge's own exercise of the function of the trier of facts.

The use of a magistrate to conduct an evidentiary hearing deprives the parties of their right to have the district judge, who is the ultimate finder of facts, consider the demeanor of witnesses for purposes of determining their credibility. Since the determination as to a witness' credibility is often crucial to the ultimate decision habeas corpus case, it is submitted that the delegation to United States Magistrates of the duty to conduct evidentiary hearings and to make recommendations as to findings of fact has the effect of depriving the district judge of a means by which he can fairly determine the facts. Accordingly, such a delegation is invalid under Article III.

Amicus recognizes that while the courts have not expressly held that the assignment of magistrates to conduct evidentiary hearings violates Article III, it is noteworthy that a number of courts have expressed concern about the possible unconstitutionality of a magistrate's undertaking duties which should be reversed for an Article III judge.

In *Reed v. Board of Election Commissioners of City of Cambridge*, 459 F. 2d 121, 123 (1st Cir. 1972), the Court held a decision made by a magistrate without notice and without opportunity granted petitioner to be heard by a judge was a "laying on hands" and an "abnegation of judicial authority by the court entirely contrary to the provisions of Article III." Moreover in *Rainha v. Cassidy*, 454 F. 2d 207, 208 (1st Cir. 1972), the court stated that it found unappealing "the thought that the magistrate, rather than recommending a hearing after a preliminary review, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands . . . ." From the foregoing it is submitted that United States Magistrates may not properly be assigned the duty to conduct evidentiary hearings under Article III of the Constitution.

Amicus further submits that the use of United States Magistrates to conduct evidentiary hearings is improper under Article III for the additional reason that unlike the district judge, who is appointed during good behavior under the provisions of Article III, a United States Magistrate is appointed by the district court and serves for a term of only eight years. 28 U.S.C. §631. Because a United States Magistrate depends for his reappointment on the decision of the district court judge or judges who have the duty to review his decisions, the magis-

trate lacks the independence and authority requisite to a determination of the serious questions presented in habeas corpus cases.

It should be noted that the gravity of federal habeas corpus proceedings does not stem exclusively from the rights of prisoners which may be at stake. Federal habeas corpus cases involving state prisoners present serious questions because under the federal habeas corpus statutes, 28 U.S.C. §§2241 *et seq.*, a single district judge is conferred with what amounts to the power to set aside the judgment of a trial judge even after affirmance by the highest appellate court in the State. *Amicus* submits that the extraordinary power conferred on the federal district courts entitles the State to a hearing by a judge who has been duly appointed under Article III of the Constitution.

B. The Federal Habeas Corpus Statutes, Require That Evidentiary Hearings in Habeas Corpus Matters Be Conducted by District Court Judges

United States Magistrates are not authorized under the federal habeas corpus statutes to conduct evidentiary hearings. The question of the authority of district judges to delegate to commissioners the power to conduct evidentiary hearing was considered in *Holiday v. Johnson*, 313 U.S. 342, 350-54 (1941) wherein this Court held that United States commissioners were not empowered under then existing habeas corpus statutes to conduct evidentiary hearings. 28 U.S.C. 1940 ed.; §§ 457, 458, 461; Act of Feb. 5, 1865, ch. 20, §1, (14 Stat. 385-86). At the time of the *Holiday* decision, section 457 of Title 28 directed that "The person to whom the writ is directed shall certify to the *court. or justice, or judge* before whom it is returnable the true

cause of the detention of such party;" section 458 required that "The person making the return shall at the same time bring the body of the party before the *Judge* who granted the writ;" and section 461 required that "The *court, or justice, or judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." [Emphasis added.]

Similar language regarding the duties of a "court, justice or judge" in habeas corpus proceedings is contained in 28 U.S.C. § 2243, the successor statute to the provisions which *Holiday v. Johnston* held to have required that the district judge himself conduct evidentiary hearings in habeas corpus matters. The Court may not presume that Congress was unaware of the legislative history and judicial interpretation of the habeas corpus statutes when it retained the language of the former habeas corpus statutes in a subsequent statute *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 106-07 (1941). The court in *Payne v. Wingo*, 442 F.2d 1192, 1194-95 (6th Cir. 1971), has recently applied the reasoning of *Holiday v. Johnston* to section 2243 and has ruled that a United States Commissioner, acting as a special master, is not authorized to conduct a habeas corpus evidentiary hearing. Noting that the language in the habeas corpus statutes construed in *Holiday v. Johnston, supra,* had been retained in section 2243, the Court in *Payne* held:

> ". . . Without a clear mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary."
>
> *Payne v. Wingo, supra,* at 1194-95.

Amicus submits from the foregoing that the federal habeas corpus statutes, as interpreted by the courts, require that the federal judges themselves conduct evidentiary hearings in habeas corpus matters. The passage of the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, in 1968 did nothing to alter the requirement of the habeas corpus statutes.

Magistrates are not authorized to conduct evidentiary hearings under 28 U.S.C. section 636(a)(1), which grants to United States Magistrates the powers formerly enjoyed by United States Commissioners. None of the former powers of United States Commissioners authorized them to perform such a judicial function. In *Holiday v. Johnston, supra,* this Court specifically determined that commissioners were not authorized to conduct evidentiary hearings. *See also Payne v. Wingo, supra.*

Petitioner contends that the conducting of habeas corpus evidentiary hearings by United States Magistrates is authorized under 28 U.S.C. §636(b), which provides that Magistrates may be assigned additional duties which are not inconsistent with the Constitution or laws of the United States. *Amicus* submits that since federal habeas corpus statutes expressly require that a district judge conduct habeas corpus evidentiary hearings, the assignment to a magistrate of the duty to conduct such a hearing would be "inconsistent with the laws of the United States" and therefore unauthorized under 28 U.S.C. section 636(b).

C. The Use of United States Magistrates to Conduct Evidentiary Hearings Is Contrary to the Legislative Intent of Congress

The legislative history of the Federal Magistrates Act of 1968 demonstrates conclusively that the Congress had no intention of authorizing the holding of evidentiary hearings by magistrates. In 1966, a proposed Federal Magistrates Act, Senate Bill 3475, included a proposed section 636(b), Title 28, which contained the following language:

> "Any district court of the United States may assign to any United States magistrate appointed by that court the discharge within the territorial jurisdiction prescribed by his appointment of such additional powers or duties as are not inconsistent with the Constitution and laws of the United States. Such additional powers and duties may include, but are not restricted to—
>
> "(1) service as a special master in an appropriate civil action;
>
> "(2) supervision of the conduct of any pretrial discovery proceeding in a civil or criminal action; and
>
> "(3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses." S. 3475, 89th Cong. 2d Sess. § 636(b), (1966), *quoted in Hearings on Federal Magistrates Act, S. 3475, 89th Cong. 2d Sess. and S. 945, 90th Cong. 1st Sess. Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary* at 20-21 (1966-67).

In its report filed on the bill the Judicial Conference Committee on the Administration of Criminal Law expressed its concern that the enumeration of duties in the proposed section 636(b) of the bill constituted a delegation of authority which was so broad in scope as to make the subsection vulnerable to possible constitutional attack. *Hearings on the Federal Magistrates Act, supra* at 241j, 241n; *see also TPO, Inc. v. McMillen,* 460 F.2d 348, 355-59 (7th Cir. 1972).

In 1967, a revised bill, which was ultimately adopted as the Federal Magistrates Act, was introduced in the Senate as S. 945. Although S. 945 retained certain enumerated duties in section 636(b) which could be assigned to magistrates, such duties were qualified and limited so as to avoid the constitutional problems raised in its predecessor bill.

Under the revised Section 636(b), contained in Senate Bill 945, "service as a special master" in subsection one of section 636(b) in S. 3475 was expressly made subject to the Federal Rules of Civil Procedure which include the highly restrictive Rule 53. In subsection two, "supervision of the conduct" of pretrial or discovery was reduced to "assistance to a district judge." In subsection three "preliminary consideration of applications for post-trial relief" in the prior bill was reduced to "preliminary review" leading to "submission of a report and recommendations to faciliate the decision of the district judge" as to "whether there should be a hearing." *TPO, Inc. v. McMillen, supra,* 460 F. 2d at 357.

In its report on S. 945, the Judicial Conference Committee on the Administration of Criminal Law

made the following comments on the revised section 636(b)(3):

> "The attached draft bill further includes among powers and duties which may be assigned to magistrates (section 636(b)(3)), *'preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case.' The Committee approves this version subject to the addition of the phrase after the word 'case'—'as to whether there should be a hearing.'
>
> "This will make it clear that *it is the judge's responsibility to make the ultimate decisions and to hold hearings on such applications, rather than that of the magistrate.* [Emphasis added.] The earlier version in S. 3475, which the Committee deemed unacceptable, had permitted a possibly broader delegation to magistrates of the power of 'preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses.'" *Hearings on the Federal Magistrates Act, supra* at 245.

In reporting S. 945 to the Senate, the Judiciary Committee was careful to characterize the provisions of section 636(b) in most restrictive terms. The report expressed its concern regarding unwitting delegations to magistrates of duties more properly discharged by judges and emphasized that the additional duties assignable to magistrates under section 636(b) would be limited to those which were consistent with the Constitution and laws of the United States. S. Rep. No.

371, 90th Cong. 2d Sess. 25-27 (1967), quoted in *TPO, Inc. v. McMillen, supra,* 460 F. 2d at 357-58.

The report of the Judiciary Committee as to section 636(b)(1), indicated that the magistrates' authority to serve as special masters was governed (1) by Rule 53(b) of the Federal Rules of Civil Procedure, which limits the use of masters to exceptional cases, and (2) by the rule of *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256 (1957), which prohibits any use of special masters which would result in the abdication of the decision making responsibility properly belonging to the district court. As to section 636(b)(2), the Committee emphasized that unlike its predecessor bill, magistrates in the area of post conviction relief, could undertake duties such as were previously handled by law clerks. The Committee reported:

> ". . . A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time of experience necessary to attain real efficiency in handling such applications." *S. Rep. No. 371, supra, quoted in TPO, Inc. v. McMillen, supra* at 358.

Amicus curiae submits that the legislative history of the Federal Magistrates Act as set forth above, makes clear the intent of Congress that district judges rather than magistrates should conduct evidentiary hearings in habeas corpus matters. Not only did the appropriate

subcommittee of the Judiciary Committee reject provisions of former proposed sections which might have authorized magistrates to conduct hearings, but the final report of the Judiciary Committee to the Senate indicated that the duties of magistrates in post-conviction matters would be similar to those theretofore performed by clerks of the court.

In view of the foregoing legislative history, it is submitted that the Sixth Circuit properly applied the *ejusdem generis* principle of statutory construction to section 636(b)(3), and correctly determined the authority of magistrates in post-conviction matters to be limited to a "preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." 28 U.S.C. § 636(b)(3); *Wedding v. Wingo, supra,* 483 F. 2d at 1132-33.

Conclusion

Under Article III of the Constitution the parties to a habeas corpus proceeding are entitled to have their case heard by the district judge who is charged with the ultimate decision making. The Federal Habeas Corpus Act expressly requires that the judge himself conduct evidentiary hearings in habeas corpus matters. The Federal Magistrates Act follows the requirements expressed in the Habeas Corpus Act. The Act contains no express provision for the holding of evidentiary hearings by United States Magistrates. The language and history of the Act indicate, to the contrary, that United States Magistrates are not authorized to conduct evidentiary hearings in habeas corpus cases.

For the foregoing reasons, the State of California as *Amicus Curiae* joins Carl James Wedding in urging that the decision of the Sixth Circuit be affirmed.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WINGO, WARDEN *v.* WEDDING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–846. Argued April 22, 1974—Decided June 26, 1974

Following enactment of the Federal Magistrates Act, the United States District Court for the Western District of Kentucky amended its Local Rule 16 to provide that in addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners the full-time Magistrate shall "schedule and hear evidentiary matters . . . [to be electronically recorded] . . . deemed by the Magistrate to be necessary and proper in the determination of . . . such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District [Judge] . . . [who] . . . upon request . . . shall proceed to hear the recording of the testimony . . . and give it de novo consideration." Respondent, a state prisoner, whose petition for habeas corpus was assigned to a full-time Magistrate for processing, claimed that the Rule is invalid and filed a motion with the District Court that the Magistrate be disqualified from holding the habeas corpus hearing and that the hearing be assigned to a district judge. The District Court denied the motion; the Magistrate proceeded with the hearing; and thereafter he transmitted the electronic recording to the District Court along with his written findings and conclusions recommending dismissal. The District Court, following respondent's motion for a *de novo* hearing, listened to the recording, on the basis of which, together with the Magistrate's findings and conclusions, it dismissed the petition. The Court of Appeals reversed, holding that, notwithstanding a formal revision of the habeas corpus statute, 28 U. S. C. § 2243, the construction of the predecessor statute given in *Holiday* v. *Johnson*, 313 U. S. 342, still applied, to the effect that the statute

Syllabus

plainly accorded a prisoner seeking habeas corpus relief the right of testifying before a judge. *Held:*

1. Title 28 U. S. C. § 2243, like its predecessor, Rev. Stat. § 761, requires that the district judge personally conduct evidentiary hearings in federal habeas corpus cases. *Holiday* v. *Johnson*, *supra*; *United States* v. *Hayman*, 342 U. S. 205, 231 n. 16; *Brown* v. *Allen*, 344 U. S. 443, 462–463. Pp. 6–8.

2. It is clear from the text and legislative history of the Magistrates Act that Congress did not intend to alter the requirements of 28 U. S. C. § 2243, and therefore Local Rule 16, insofar as it authorises the full-time Magistrate to hold habeas corpus evidentiary hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b), and because § 636 (b) itself precludes a district judge from assigning a Magistrate the duty of conducting an evidentiary hearing and limits the Magistrate's review to proposing, not holding, such a hearing. Pp. 8–11.

3. The invalidity of Local Rule 16 is not cured by the procedure relating to electronic recording, which does not enable the district judge to evaluate credibility by personally hearing and observing the witnesses. Pp. 12–13.

483 F. 2d 1131, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 73-846

John W. Wingo, Warden, Petitioner, v. Carl James Wedding. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 26, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether Federal Magistrates are authorized to conduct evidentiary hearings in federal habeas corpus cases. In 1968, Congress enacted the Federal Magistrates Act, 28 U. S. C. §§ 631–639, to upgrade and expand the former United States commissioner system. The Act authorizes magistrates to exercise all powers formerly exercised by United States Commissioners,[1] and also, as a means of relieving the caseload burden of the Federal District Judges empowers Magis-

[1] Commissioners had been empowered by the Federal Rules of Criminal Procedure to give oaths (Rule 3); issue arrest warrants (Rule 4); conduct preliminary examinations of arrestees (Rule 5); issue subpoenas (Rule 17); issue warrants of removal to another district (Rule 40); and release defendants on bail (Rule 46). In addition, commissioners were authorized to try persons accused of petty offenses (defined by 18 U. S. C. § 1 (3) as crimes for which the penalty does not exceed imprisonment for six months or a fine of not more than $500 or both) committed within the confines of federal enclaves, 62 Stat. 830. In civil cases commissioners were limited to administering oaths and taking bail, acknowledgments, affidavits and depositions. 62 Stat. 917.

trates to try minor offenses when all parties consent,[2] and to perform such additional duties assigned by the District Court as are "not inconsistent with the Constitution and laws of the United States."[3] Pursuant to the Act, the Judges of the United States District Court for the Western District of Kentucky amended Local Rule 16 of that court to provide:

> "In addition to submitting such other reports and recommendations as may be required concerning petitions for writ of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the

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[2] Unlike the more restricted criminal trial jurisdiction of the former commissioners, see n. 1, *supra*, the authority of Magistrates extends to minor offenses committed anywhere within the judicial district and includes crimes punishable by imprisonment not exceeding one year, or a fine of not more than $1,000, or both.

[3] Section 636 (b) of the Federal Magistrates Act, 28 U. S. C. § 636 (b) provides:

"(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

"(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

"(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

"(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration."

Respondent is a state prisoner whose petition for federal habeas corpus relief was assigned by the District Court to a full-time Magistrate for processing under the Rule. The part of the Rule challenged here is that which directs the full-time Magistrate "to schedule and hear evidentiary matters . . . [to be electronically recorded] . . . deemed by the Magistrate to be necessary and proper in the determination of . . . such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge . . . [who] . . . [u]pon request . . . shall proceed to hear the recording of the testimony . . . and give it de novo consideration." The question is whether this portion of the Rule is invalid because "inconsistent with the . . . laws of the United States" within the meaning of § 636 (b) of the Federal Magistrates Act, or because § 636 (b) itself

should be construed to preclude district courts from assigning such duties to Magistrates.

I

Respondent, Carl James Wedding, is a prisoner in the Kentucky State Penitentiary serving a life sentence imposed in 1949 by the Webster Circuit, Commonwealth of Kentucky, after a plea of guilty to a charge of willful murder. Wedding filed this petition for habeas corpus in 1971. After the Court of Appeals for the Sixth Circuit reversed the initial dismissal of his petition, 456 F. 2d 245 (1972), and remanded for an evidentiary hearing, the District Court invoked Local Rule 16 and assigned the case to a full-time Magistrate to hold the hearing. Wedding promptly moved that the Magistrate be disqualified and the hearing be reassigned to a District Judge, on the ground that the Federal Magistrates Act did not authorize District Courts to assign to Magistrates the duty to hold habeas corpus evidentiary hearings. When the District Court denied the motion, the Magistrate proceeded with the hearing, and electronically recorded all testimonial evidence as required by Local Rule 16. Thereafter, the Magistrate transmitted the recording of the testimony to the District Judge and submitted written findings of fact and conclusions of law recommending that the petition be dismissed.

Wedding moved that the District Court give the matter a *de novo* hearing. The District Judge's response was to listen, as authorized by Local Rule 16, to the recording of the hearing before the Magistrate. On this basis and the Magistrate's findings and conclusions, the District Court entered an order dismissing respondent's petition.

On appeal, Wedding renewed his challenge to Local Rule 16, relying upon *Holiday* v. *Johnson*, 313 U. S. 342

(1941). *Holiday* was also a federal habeas corpus case. There, after determining that the petition for writ of habeas corpus alleged facts which, if proved, would entitle the petitioner to relief, the District Judge issued a writ compelling the respondent to produce the petitioner before a designated United States Commissioner. The commissioner held an evidentiary hearing at which the petitioner testified and the respondent submitted the depositions of two witnesses. On the basis of the evidence received, the commissioner made findings of fact and stated conclusions of law recommending that the writ be denied. After hearing oral argument on the commissioner's report, the District Judge entered an order discharging the writ.

This Court reversed, holding that the factfinding procedure employed failed to conform to Congress' express command in the Habeas Corpus Act that "[t]he *court, or justice, or judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." Rev. Stat. § 761, 28 U. S. C. § 461 (1940 ed.) (emphasis added). The Court held that the statute plainly accords a prisoner the right of testifying before a *judge*, stating:

> "One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.
>
> . . . . .

> "The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings." *Holiday* v. *Johnson*, *supra*, 313 U. S., at 352, 353–354.

Wedding contended that neither the text nor legislative history of the Federal Magistrate Act evidence a congressional intent to overrule *Holiday*. The Court of Appeals agreed and accordingly "vacate[d] the judgment of dismissal and remand[ed] the case with instructions that the [District] Court itself hold an evidentiary hearing on [Wedding's] constitutional claims." 483 F. 2d 1131, 1137 (1973). We granted certiorari, 414 U. S. 1157 (1974). We affirm.[4]

II

Under our constitutional framework, the "great constitutional privilege" of habeas corpus, *Ex parte Bollman* 8 U. S. (4 Cranch) 75, 95 (1807) (Marshall, C. J.), has historically provided "a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391, 401–402 (1963). More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact. Accordingly,

[4] We thus agree with the Court of Appeals that this case does not require resolution of the question whether Congress constitutionally may enact legislation vesting authority, pursuant to rule or order of court, in magistrates to hold evidentiary hearings on habeas corpus petitions. We indicate no views as to the validity of investing such authority in a magistrate or other officer "outside the pale of Article III of the Constitution." 483 F. 2d 1131, 1133 n. 1 (1973).

since the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386, Congress has expressly vested plenary power in the federal courts "for taking testimony and trying facts anew in habeas hearings . . . ." [5] *Fay* v. *Noia*, *supra*, 372 U. S., at 416. See also *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963).

In connection with the 1948 revision and recodification of the Judiciary Code,[6] Rev. Stat. § 761, construed in *Holiday*, and other procedural provisions of the Habeas Corpus Act were consolidated into 28 U. S. C. § 2243. The pertinent portion covering habeas corpus evidentiary hearings provides that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The Revisers thus deleted some words from Rev. Stat. § 761, but the Revisers' Notes accompanying § 2243, together with the reports of the Committee of the Judiciary of the Senate,[7] and of the House,[8] make abundantly clear that the word changes and omissions in Rev. Stat. § 761 were intended only as changes in form.[9]

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[5] The relevant portion of the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385–386,, provides that the "court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

[6] 62 Stat. 869.

[7] S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2 (1948).

[8] H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A178 (1947).

[9] See also, Moore's Commentary on the U. S. Judicial Code 436 n. 78 (1949); *Payne* v. *Wingo*, 442 F. 2d 1192, 1194 (1971).

Had any substantive change in the meaning of Rev. Stat. § 761, as construed in *Holiday* v. *Johnson*, been intended, the Revisers' Notes would have called attention to the change. William W. Barron, the Chief Revisor of the Code, explained, "no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes

Accordingly, the construction of § 2243 has been that given § 761 in *Holiday*. *United States* v. *Hayman*, 342 U. S. 205, 213 n. 16 (1952); *Brown* v. *Allen*, 344 U. S. 443, 462–463 (1953). The Court held in the latter case:

> "A federal *judge* on a habeas corpus application is required to 'summarily hear and determine the facts, and dispose of the matter as law and justice require,' 28 U. S. C. § 2243. This has long been the law. R. S. § 761, old 28 U. S. C. § 461." *Ibid.* (emphasis added).

III

Our inquiry is thus narrowed to the question whether the Federal Magistrates Act changed the requirement of § 2243 that federal judges personally conduct habeas corpus evidentiary hearings. Certainly nothing in the text or legislative history of the Magistrates Act suggests that Congress meant to change that requirement.[10] Rather, both text and legislative history plainly reveal a congressional determination to retain the requirement. For, although the Act gives district judges broad authority to assign a wide range of duties to Magistrates, Congress carefully circumscribed the permissible scope of assignment to only "such additional duties as are *not inconsistent with the Constitution and laws of the United States.*" 28 U. S. C. § 636 (b) (emphasis added). And in defininingassignable duties, Congress decreed that the duty of holding evidentiary hearings was not assignable.

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of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised." Barron, The Judicial Code 1948 Revision, 8 F. R. D. 439, 445–446 (1948). See also S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2 (1948); H. R. Rep. No. 308, 80th Cong., 1st Sess., p. 7 (1947).

[10] A full discussion of the legislative history of the Federal Magistrates Act will be found in *TPO, Inc.* v. *McMillen*, 460 F. 2d 348 (1972).

This clearly emerges from the legislative history of subsection (3) of § 636 (b), which provides:

> "(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" 28 U. S. C. § 636 (b) (3) (emphasis added).

That legislative history reveals that the Judicial Conference of the United States objected to successive phrasings of subsection (b) (3) until it was phrased to make clear that the authority given district courts to assign duties to Magistrates did not include authority to hold evidentiary hearings on applications for posttrial relief.[11] The original draft of the subsection [12] had proposed that Magistrates' duties include

> "(3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses."

But because that language was susceptible to the interpretation that Magistrates might conduct evidentiary

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[11] Where Congress gave magistrates authority to conduct hearings, the authority was express and circumscribed with procedural safeguards. Thus 28 U. S. C. § 636 (a) (3) gives magistrates jurisdiction to conduct trials for minor offenses, but 18 U. S. C. § 3401 provides that any person charged with a minor offense may elect to be tried by a district judge. 28 U. S. C. § 636 (b) (1) authorizes magistrates to serve as special masters—which frequently involves the conduct of hearings—but makes that service subject to the Federal Rules of Civil Procedure, which include the restrictions of Rule 53 (b) that "reference to a master shall be the exception and not the rule." See Note, Developments—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1189 n. 229 (1970).

[12] S. 3475, "The Federal Magistrates Act of 1966," 89th Cong., 2d Sess. (1966).

hearings, the Judicial Conference of the United States objected to it.[13] Accordingly, the subsection was rewritten to provide

> "(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case."

The Committee on the Administration of the Criminal Laws of the Judicial Conference objected that the revision did not "make it clear that it is the judge's responsibility to make the ultimate decisions and to hold hearings on such applications, rather than that of the magistrate."[14] The Committee therefore recommended the addition of the phrase "as to whether there should be a hearing" immediately following the word "case."[15] The proposed addition was made,[16] and subsection (b) (3) in its present form was enacted. Thus, although § 636 (b) provides that "additional duties authorized by rule may include, but are not restricted to," duties defined in subsection (b) (3), the legislative history of the subsection compels the conclusion that Congress made a deliberate choice to preclude district courts from assigning magistrates the duty to hold evidentiary hearings.

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[13] See the Report of the Committee on the Administration of the Criminal Laws, adopted by the Judicial Conference in September 1966, reprinted in the Hearings on S. 3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 241j, at 241n (1967).

[14] See the Report of Committee on the Administration of the Criminal Laws, adopted by the Judicial Conference in March 1967, reprinted in the Hearings on S. 3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 244, at 245 (1967).

[15] *Ibid.*

[16] S. 945, "The Federal Magistrates Act of 1967," 90th Cong., 1st Sess. (1967).

We conclude that, since § 2243 requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases, Local Rule 16, insofar as it authorizes the full-time Magistrate to hold such hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b). We conclude further that the Rule is to that extent invalid because, as we construe § 636 (b), that section itself precludes District Judges from assigning Magistrates the duty of conducting evidentiary hearings.[17] Review by Magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings.[18] In connection with the preliminary review whether or not to propose that the District Judge hold an evidentiary hearing, we agree that Magistrates may receive the state court record and all affidavits, stipulations and other documents submitted by the parties.[19] Magistrates are prohibited only from conducting the actual evidentiary hearings.[20]

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[17] See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 364–365 (1973); Note, Developments—Federal Habeas Corpus, 1038, 1188–1189 (1970).

[18] "A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications." S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967).

[19] To the extent that *O'Shea* v. *United States*, 491 F. 2d 774 (CA1 1974), and *Noorlander* v. *Ciccone*, 489 F. 2d 624 (CA8 1973), suggest that magistrates may also accept oral testimony, provided that each party has the right to a *de novo* hearing before the District Judge, we disagree. Such a procedure is precluded by both § 2243 and § 636 (b).

[20] Since under § 636 (b) District Judges may call upon Magistrates to relieve them of most other details of the processing of habeas

The invalidity of Local Rule 16 is not cured by its provision that the "District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration." *Holiday* reasoned that the command of § 761, now § 2243, was designed by Congress in recognition that "one of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." 313 U. S., at 352. "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser* v. *Randall*, 357 U. S. 513, 520 (1958). Congress, *Holiday* held, "[p]lainly . . . intended that the prisoner might invoke . . . appraisal by the judge himself." In that circumstance, we "cannot say that any appraisal of the truth of the prisoner's oral testimony" based on listening to a recording of it, "is, in light of the

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corpus applications, it does not appear that judges will be significantly overburdened by the requirement that they personally conduct evidentiary hearings. Indeed, data from the Administrative Office of the United States Courts indicates that very few habeas corpus cases ever reach the evidentiary hearing stage. In 1973, of the 10,800 prisoner petitions filed for habeas corpus or as § 2255 motions to vacate sentence, less than 5%, or approximately 530, necessitated evidentiary hearings. See Report of the Director of the Administrative Office of the United States Courts A–13, A–36 (1973). When hearings were required, 88% were completed in one day or less. *Id.*, at A–36. Thus, among the 400 District Judges, the burden of evidentiary hearings averages less than 1.5 hearing days per judge per year. To the extent that the 80 active Senior District Judges also participate in habeas corpus cases, the hearing burden upon each District Judge is further reduced.

purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." 313 U. S., at 352.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 73-846

John W. Wingo, Warden, Petitioner, v. Carl James Wedding. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 26, 1974]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE joins, dissenting.

The Court today reads two separate statutes and our prior cases to reach a result contrary to the purposes underlying the enactment of the federal Magistrates Act of 1968, 28 U. S. C. § 631 *et seq.*, and to the conclusion of every other Court of Appeals which has had occasion to consider the matter.[1]

The federal Magistrates Act was both "designed to create an upgraded lower tier of judicial officer," S. Rep. No. 371, 90th Cong., 1st Sess., 11 (1967), and "intended . . . to cull from the ever-growing workload of the U. S. district courts matters that are more desirably performed by a lower tier of judicial officers." H. R. Rep. No. 1629, 90th Cong., 2d Sess., 12 (1968). The Court's holding that federal magistrates may not conduct evidentiary hearings in federal habeas corpus cases is both inconsistent with the new status of magistrates and deputy

[1] Two Circuits have ruled that federal magistrates may conduct evidentiary hearings in federal habeas corpus cases, *O'Shea* v. *United States*, 491 F. 2d 774, 778 (CA1 1974); *Noorlander* v. *Ciccone*, 489 F. 2d 642, 648 (CA8 1973); cf. *Campbell* v. *U. S. District Court* (CA9, Apr. 19, 1974) (No. 73-3022), slip op., at 10, while two Circuits have assumed magistrates have that power, *Gonzalez* v. *Zelker*, 477 F. 2d 797, 798 (CA2 1973); *Parnell* v. *Wainwright*, 464 F. 2d 735, 736 (CA5 1972).

magistrates,[2] and serves to defeat the objective of the Act, described by Senator Tydings, its principal sponsor, see n. 2, *supra*, "to provide District Judges with more time to devote to the actual trial of cases and writing of opinions." [3] Hearings on S. 3475, 89th Cong., 2d Sess., 3 (1966).

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[2] The Court makes clear, *ante*, at 11 n. 18, that it sees the function of the magistrate in dealing with habeas corpus petitions as being no more than that previously performed by law clerks. As Chief Judge Theodore Levin (ED Mich.) testified before the Senate Judiciary Committee's Subcommittee on Improvement in Judicial Machinery, which under the chairmanship of Senator Joseph D. Tydings began the investigative hearings in 1965 which led to the enactment of the Act three years later, law clerks are not overworked, and are better able to perform such tasks. "In any event, this is a somewhat tedious job . . . and is not a function likely to entice a seasoned and competent lawyer to accept a magistrate's job." Hearings on S. 3475, 89th Cong., 2d Sess., 61 (1966). The Act specifically sought to make "the position [of magistrate] more attractive to highly qualified individuals." S. Rep. No. 371, 90th Cong., 1st Sess., 11 (1967). The Department of Justice agreed that such a limited function would be inconsistent with the Act's purpose, *id.*, at 130, and Chief Judge Robert C. Belloni and Dean Robert B. Yegge have noted that the magistrates "should not be simply high paid law clerks." Reports of the Conference for District Judges, 59 F. R. D. 203, 221 (1973). To limit a magistrate to a law clerk's function surely undercuts what Senator Tydings stated to be "[t]he first goal of the Magistrates Act . . . to [give the magistrate] qualifications and a stature higher than those of the present U. S. commissioner." Hearings, *supra*, at 26.

[3] No one would dispute the heavy burden on District Courts represented by the applications for habeas corpus writs they receive, a large volume of which has been long-recognized as "repetitious and patently frivolous." *United States* v. *Hayman*, 342 U. S. 205, 212 (1952) (footnote omitted). The Court would minimize the burden of these applications at the evidentiary hearing stage, *ante*, at 11 n. 20, but the beguiling simplicity of its statistical analysis obscures reality and is antagonistic to the interests of habeas petitioners. First, to average hearing days per judge per year evenly across the country fails to recognize the uneven number of habeas corpus appli-

I

In its two-stage analysis, the Court finds first that under the terms of the Act it would be "inconsistent with the . . . laws of the United States," 28 U. S. C. § 636 (b), to permit magistrates to conduct evidentiary hearings in habeas corpus cases. This is so, it is said, because a procedural provision of the Habeas Corpus Act, Rev. Stat. § 761, was construed 33 years ago, long before the enactment of the Magistrates Act, to confine that function to judges alone. *Holiday* v. *Johnson*, 313 U. S. 342 (1941). The 1948 revision and recodification of the Judicial Code, which incorporated Rev. Stat. § 761 into 28 U. S. C. § 2243, is held to have carried forward this limitation despite a critical language change. *United States* v. *Hayman*, 342 U. S. 205 (1952); *Brown* v. *Allen*, 344 U. S. 443 (1953). Neither the new statute, its drafting history, nor these latter cases, support the Court's conclusion.

Section 2243 did, as the Court notes, import into its

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cations received by the various District Courts. In his testimony at the Senate hearings on the bill Chief Judge Edward S. Northrup (Md.) reflected the unevenness experienced by his court, which at one time handled more "State prisoner habeas corpus petitions . . . than any other district in the country." Hearings, *supra*, n. 2, at 52. Clearly Judge Northrup's burden would have exceeded "1.5 hearings days . . . per year." Second, the habeas corpus applications which ultimately reach the hearing stage do not represent all those which might warrant a hearing. Senator Tydings stated:

"We say that the magistrate should be able to [hold] plenary, discovery hearings. Now, what happens . . . as a practical matter, you get no hearings. The law clerk reviews the papers . . . so we are giving the individual [petitioner] actually an opportunity . . . for more consideration than he gets now." *Id.*, at 113.

Finally, even if no more applications would warrant an evidentiary hearing, given the other burdens on district judges those applications which would warrant hearings would receive more prompt attention if magistrates were to hold them. The virtues of speedy justice need not be elaborated here.

terms Rev. Stat. § 761, both of which provisions set forth in part what authority shall hear and determine the facts involved in an application for a writ of habeas corpus. And § 2243 changed the language of Rev. Stat. § 761, which originally read that the authority was to be the "court, justice or judge," now to read simply the "court." But the Court fails to note that § 2243 incorporated a second provision from the Habeas Corpus Act, Rev. Stat. § 755, which in part set forth what authority shall issue the writ of habeas corpus for which application was made. The authority to issue the writ set forth in Rev. Stat. § 755 was identical to that set forth in Rev. Stat. § 761 to hear and determine the facts: the "court, justice, or judge." Unlike the language of Rev. Stat. § 761, however, the quoted language of Rev. Stat. § 755 was not changed when it was incorporated into § 2243; under the present statute, it is still the "court, justice, or judge" who shall issue the writ.

Congress sought to make certain that only a "court, justice, or judge" could issue the writ; but by changing the authority to hear the facts from a "court, justice, or judge" to, simply, a "court," Congress must have intended to broaden the authority of the court, at least to the extent of permitting delegation to a magistrate to perform the preliminary hearing function, subject always to the approval of a district judge.[4] To read the language change in any other way would impute to Congress an intent to alter statutory language, the meaning of which had already been finally determined by this Court, *Holiday* v. *Johnson*, *supra*, without the knowledge that the alteration would raise interpretive difficulties. Moreover, to change the language of Rev. Stat. § 761, but not

[4] As noted in Part II, *infra*, it is not urged by anyone that the magistrate may finally decide facts after conducting an evidentiary hearing. That ultimate decision is, without question, one reserved to the district judge alone.

to change that of Rev. Stat. § 755, cannot be said, as the Court does, *ante*, at 7 n. 9, to be a "mere change in phraseology," for such changes were undertaken only for purposes of uniformity. If, as Charles J. Zinn, counsel to the Law Revision Committee which revised the Judicial Code, testified, "we have changed the language to get a uniform style," [5] then within the *same* statutory provision, surely Congress would have made only "courts" able to issue writs, as well as hear the facts of the claim.

Nor do the cases cited by the Court, *ante*, at 8, support its interpretation of § 2243. *Brown* v. *Allen*, *supra*, is plainly inapposite. The segment of *Brown* quoted by the Court is relevant to *Brown*'s discussion of whether a petitioner under 28 U. S. C. § 2254 had a right to a plenary hearing although an earlier petition of his which presented substantially the same federal issues was refused in the state court. When the Court quotes from *Brown*: "This has long been the law," *ante*, at 8, it is referring to what the *Brown* Court called the "general rule" approved in *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924). *Brown*, *supra*, 344 U. S., at 463. *Salinger* in turn makes it clear that the "general rule" which has "long been the law" has nothing whatever to do with who may hear and determine the facts on an application for a writ of habeas corpus. Rather, it pertains only to that portion of § 2243 which *Brown* itself quoted, 344 U. S., at 462, and which *Salinger* also quoted, 265 U. S., at 231, that is, "to dispose of [the matter or party] as law and justice [may] require." In *Salinger*, this rule meant each application for a writ of habeas corpus could be disposed of in the exercise of judicial discretion, which could in part give controlling weight to "a prior refusal [by a federal court] to discharge on a like application." 265 U. S., at 231.

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[5] Hearings on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., 40 (1947).

In *Brown*, that rule was extended under certain circumstances to a prior state court refusal to issue the writ, in support of the Court's conclusion there that a § 2254 petitioner had no right to a plenary hearing on his application for the writ. The rule the Court relies on today is thus one of discretion to hold an evidentiary hearing "as law and justice require," which has no bearing on what official shall conduct the hearing once a decision is made to hold one. *Brown* is thus no authority for the proposition that the same limitation *Holiday* placed on Rev. Stat. § 761 ("court, justice, or judge") applies to § 2243 ("court") enacted after *Holiday*.

The Court also relies upon *United States* v. *Hayman*, *supra*, to support its interpretation of § 2243. The issue in *Hayman* had nothing to do with who shall hear and determine facts upon an application for a writ of habeas corpus. Rather, the Court there was concerned solely with the question whether a district court may, upon an evidentiary hearing, decide factual issues presented by a motion under 28 U. S. C. § 2255, where the movant was not notified and was not present. In the context of discussing an earlier case which had held that a district court must decide material issues of fact by taking evidence, not by *ex parte* affidavits, *Hayman* dropped a footnote stating simply "[n]or can the factual issues be heard before a commissioner," citing *Holiday*, *supra*. 342 U. S., at 213, n. 16. Not only was this footnote completely irrelevant to the issue in *Hayman*, its citation to *Holiday* for support, without further discussion, makes manifest that the Court did not consider the effect of the subsequent language change in § 2243 on the statute (Rev. Stat. § 761) which *Holiday* construed. The fulfillment of the purposes of the federal Magistrates Act should not hang on such a slim reed.

II

Even assuming that § 2243 was intended to carry forward the limitation of Holiday's interpretation of its predecessor, by enacting the Magistrates Act, and particularly subsection 636 (b) thereof, Congress made clear its intent to eliminate that restriction. Thus, while *Hayman* may speak in terms of a "commissioner," Congress changed not only the title of that office, but also the qualifications for and the functions of the office.

Subsection 636 (b) permits federal magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The subsection then sets forth in three subdivisions certain duties which district courts may authorize by rule, but the duties "are not restricted to" those set forth. The third illustrative subdivision provides that district courts may authorize the additional duty of

> "preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." 28 U. S. C. § 636 (b)(3).

Subdivision (3), suggesting additional duties that may be assigned to a magistrate in connection with federal habeas corpus cases, does not by its terms permit magistrates to conduct evidentiary hearings, but that subdivision is merely illustrative, not exclusive.

> "The mention of the three categories is intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable." S. Rep. No. 371, 90th Cong., 1st Sess., 25 (1967).

The House Report virtually tracks the language of the Senate Report. H. R. Rep. No. 1629, 90th Cong., 2d Sess., 19 (1968). Thus, there being no constitutional barrier to permitting magistrates to conduct evidentiary hearings,[6] nor any other legal barrier, *see* Part I, *supra*, subsection 636 (b) enables district courts, as did the District Court here, to establish rules which so permit.

Assuming *arguendo* that § 2243 does constitute a possible legal barrier to such rules, the legislative history of the Act reveals Congress to have intended the elimination of that barrier. The Court determines, in the second stage of its analysis, *ante*, at 8–11, that Congress intended the opposite result, but in this matter the Court's perception is less than discriminating. The lynchpin of the Court's argument is the drafting evolution of the terms of subdivision (3), quoted above. In the change of language from preliminary "consideration" to preliminary "review,"[7] and in the addition of "as to whether there should be a hearing,"[8] the Court finds an intent to bar

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[6] No such barrier is suggested by the Court today, and properly framed, district court rules which so permit woud not contravene the constitutional rights of federal habeas corpus petitioners. See Part III, *infra*.

[7] The two words were in fact used interchangeably in the legislative history. When the draft bill (S. 3475) used the word "consideration," the Subcommittee Staff Memorandum in support of the bill used the word "review." Hearings, *supra*, n. 2, at 34. When the draft bill was changed to use the word "review," the Senate Report accompanying the new bill (S. 945) used the word "consideration." S. Rep. No. 371, 90th Cong., 1st Sess., 8 (1967).

[8] Despite the addition of this language, the House Report, in setting forth the enumerated examples of Subsection 636 (b), stated of Subdivision (3) only that "[m]agistrates may also be assigned the function of reviewing and reporting to district judges upon application for postconviction relief." H. R. Rep. No. 1629, 90th Cong., 2d Sess., 19 (1968). No limitation on the nature of the review or report was indicated. The language of the Senate Report also made

magistrates from conducting a hearing. But the language changes in the subdivision were made only due to a fear that magistrates would be thought to have been given final adjudicatory power, not to preclude them from conducting hearings when the district judges retained such power.[9] Indeed, the latter was specifically intended.

> "As the Senate Report stated, Subsection 636 (b) contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge . . . ." S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967).

The concern about enabling magistrates to make the ultimate decision found early expression in the Senate hearings in the bill in a colloquoy between Senator Tydings and then-Assistant Attorney General Vinson. Mr. Vinson ultimately revealed his real concern in a letter to the

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no reference to decisions whether there should be hearings. S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967).

[9] The Court twice makes reference, *ante*, at 9 n. 11 and 11 n. 17, to Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1138–1189 and n. 229 (1970), in support of its position. Both references are mistakenly addressed to final decision-making power, not the power to conduct hearings where the district judge makes the ultimate decision. The Note itself concedes that "it is possible to argue [under Subsection 636 (b)] that a plan to have magistrates actually hear cases is valid under the Act." *Id.*, at 1189 n. 229. It then argues the other way in reference to matters as to which magistrates have final power of decision. *See* 26 U. S. C. § 636 (a)(3). That is the only power of magistrates circumscribed by the procedures to which the Court refers, *ante*, at 9 n. 11. To the extent the Court goes beyond the Note and argues that magistrates' service as special masters, 28 U. S. C. § 636 (b)(1), is limited by Fed. Rule Civ. Proc. 53 (b), the early strictures upon employing special masters were developed before the existence of the judicial office of magistrate and arguably should not be applied to that new office. See generally Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 Chi. L. Rev. 584 (1973).

Subcommittee that subdivision (3) as originally drafted would give the power of ultimate decision to the magistrate: "if preliminary consideration is intended to involve adjudication, it should be handled by an Article 3 judge." Hearings on S. 3475, 89th Cong., 2d Sess., 130 (1966). That the Senate viewed Mr. Vinson's objections in this light is made clear by Senator Tydings' testimony in the hearings before a subcommittee of the House Judiciary Committee. Hearings on S. 945, et al., 90th Cong., 2d Sess., 72 (1968).

In response to this objection, Senator Tydings stated to Mr. Vinson at the Senate hearings:

> "We wouldn't intend for the final decision to be made by the magistrate. *But we would intend that . . . the magistrate* [be able to] *hold a preliminary* [habeas] *hearing* . . . . We certainly intended that." Hearings on S. 3475, 89th Cong., 2d Sess., 112 (1966). (Emphasis added.)

Numerous other witnesses at the Senate hearings urged that the magistrates be permitted to hold hearings. See, *e. g., id.,* at 52 (Chief Judge Northrup, *supra,* n. 3); *id.,* at 94 (Chief Judge Walter E. Hoffman (ED Va.)).

As the Court points out, *ante,* at 9, the Judicial Conference objected to the original draft bill (S. 3475), but it did not originally object to subdivision (3), as the Court states. Instead, the Conference objected to subsection 636 (b) altogether, fearing it so broad as to be subject to constitutional attack. Although not specified, it seems clear that by speaking in terms of "delegation" the Conference initially shared Mr. Vinson's concern about delegating the ultimate decision-making power of Art. III judges. Hearings on S. 945, 90th Cong., 1st Sess., 241n (1967). The Judicial Conference therefore recommended both a modified version of subsection 636 (b), and the complete elimination of all three subdivisions. *Ibid.*

When the revised draft bill (S. 945), which ultimately was enacted, was introduced, it did not follow the Judicial Conference recommendation, but continued to include the three subdivisions. As to subdivision (3), the Judicial Conference recommended the addition of the phrase "as to whether there should be a hearing," see n. 7, *supra*, but again stressed that its concern was, as with S. 3475, over the "delegation to magistrates." Hearings on S. 945, 90th Cong., 1st Sess., 245 (1967).

The tension established in this evolution is clear. On the one hand, Congress sought to enable district courts to authorize magistrates to conduct evidentiary hearings. On the other hand, there was apprehension that the power of authorization granted to district courts might lead to a rule permitting magistrates to exercise ultimate decision-making power reserved exclusively to Art. III judges. To avoid the latter but accomplish the former, Congress persisted in retaining the broad language of subsection 636 (b), and in retaining subdivision (3). Not only, as set forth earlier, does the subdivision *not* limit the subsection, it was drafted in language to insure that it could not be read to preclude authorizing magistrates to conduct hearing in federal habeas corpus cases.[10]

Plainly Congress could have used language that expressly precluded the latter. That this was not urged upon Congress by anyone, including the Judicial Conference, and that Congress did not include such language, alone suggests its intention to vest in district courts the power to authorize magistrates to hold hearings. Conversely, Congress would have taken certain risks had it expressly permitted magistrates to hold hearings, as re-

[10] Even counsel for respondent agrees (contrary to the Court's conclusion, *ante*, at 9) that subdivision (3) "could have been more clearly expressed." Tr. of Oral Arg., at 20.

vealed by the following colloquoy between Chief Judge Hoffman and Senator Tydings at the Senate hearings:

> "Judge Hoffman. And I have suggested in my statement . . . that the federal magistrate could be assigned the task as a master to conduct plenary hearings. After all, [habeas corpus proceedings] are civil proceedings . . . not criminal proceedings.
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> . . . . . .
>
> "Senator Tydings. . . . since we . . . don't have [in Subsection 636 (b)] "Including hearings" or "Including plenary hearings" or "including the conducting of plenary hearings," it is not what we should have?
>
> "Judge Hoffman. I am fearful that someone will say that it is merely an effort on the part of the judge to delegate his judicial function.
>
> "Senator Tydings. I think that is a good point, Judge Hoffman." Hearings on S. 3475, 89th Cong., 2d Sess., 93–94 (1966).

In light of the need for Congress to avoid language suggesting an unconstitutional delegation of a judicial function to a magistrate, the ambiguous provision of subsection 636 (b)—unlimited by the provisions of subdivision (3)—should be interpreted to permit magistrates to conduct evidentiary hearings in federal habeas corpus cases, Section 2243 notwithstanding, because (1) to the extent the subject was expressly discussed in the legislative history, such permission was intended, and (2) such an interpretation would serve the two principal objectives of the Act. See n. 2 and 3, *supra*.

III

The final limitation of the Act, that additional duties assigned to magistrates must not be "inconsistent with the Constitution," needs little discussion here. The Court

does not suggest that the conduct of an evidentiary hearing, where the district judge retains the power to make the final decision on an application for a writ of habeas corpus, would be unconstitutional either under Art. III or as a matter of due process of law. Where this situation obtains, the magistrate's conduct of the hearing would be clearly constitutional.[11]

Not only would his report and recommendation to the district judge be subject to amendment or outright rejection, the district judge could, at the behest of the habeas corpus petitioner or on his own motion, conduct his own evidentiary hearing to judge for himself, for example, the credibility of witnesses if he deems their testimony essential to disposition of the application. To the extent a

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[11] The commentators have generally agreed with this conclusion. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 365 (1973); Peterson, The Federal Magistrate's Act: A New Dimension in the Implementation of Justice, 56 Ia. L. Rev. 62, 98 (1970); Doyle (District Judge and Chairman of the Judicial Conference Committee charged with implementing the Act), Implementing the Federal Magistrate's Act, 39 Kan. St. B. A. J. 22, 69 (1970); Note, Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Ia. L. Rev. 1147 (1969). So too would the Judicial Conference appear to be in agreement. Proposed Amendments to the Proposed Rule Governing Habeas Corpus Proceedings for the United States District Courts, Committee on Rules of Practice and Procedure, Rule 11 (Preliminary Draft, Jan. 1973). Congress has given the magistrates power to conduct trials of a limited nature, 28 U. S. C. § 636 (a)(3), which grant of power, carefully limited, appears not to contravene any constitutional prohibition. Cf. *Palmore* v. *United States*, 411 U. S. 389 (1973). *A fortiori* granting magistrates the power to conduct hearings where the district judge retains ultimate decision-making authority comports with constitutional requirements. Cf. *Campbell* v. *U. S. District Court*, *supra*, n. 1 (hearings on motion to suppress); *Harlem River Consumers Coop., Inc.* v. *Associated Grocers of Harlem, Inc.*, 54 F. R. D. 551 (SDNY 1972) (hearings on discovery motion).

problem of constitutional magnitude may be foreseen in the particulars of the rules established by a district court, those rules can be construed to comport with constitutional requirements. In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate is intentions if its declared objectives are to be carried out.